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JOINT ENTERPRISE: RIGHTING A WRONG TURN?

Report of an exploratory study

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The Prison Reform Trust works to create a just, humane and effective penal system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government, and officials towards reform:
<http://www.prisonreformtrust.org.uk>

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Summary

This report presents the findings of an exploratory study of the common law doctrine of joint enterprise. The study was undertaken by the Institute for Criminal Policy Research of Birkbeck, University of London, in partnership with the Prison Reform Trust, and was funded by the Nuffield Foundation.

Background

Joint enterprise is a doctrine of criminal law which permits two or more defendants to be convicted of the same criminal offence in relation to the same incident, even where they had different types or levels of involvement in the incident. For centuries, it has been an established and relatively uncontentious aspect of the criminal law of England and Wales that an individual who has intentionally assisted or encouraged another to commit an offence can be held liable for that offence; and that both individuals can be convicted even if it is not known which of them committed the essential act and which was the ‘accessory’.

In recent years, however, there has been growing controversy over the doctrine of joint enterprise. Strong criticisms of both principle and practice have been voiced by lawyers, members of the judiciary, academics, politicians and penal reformers, as well as by individuals prosecuted in joint enterprise cases and their supporters. These criticisms have focused on what is said to be the potential for individuals to be convicted and sentenced, under the doctrine of joint enterprise, for the most serious offences on the basis of highly peripheral involvement in the criminal acts. It is argued that in many such cases the level of participation in the offence was so slight, or the evidential threshold of conviction so low, that the conviction amounts to a substantial injustice. A related criticism is that young men from black, Asian and minority ethnic (BAME) groups are disproportionately affected or are explicitly targeted by joint enterprise convictions in cases of presumed gang-related violence. It has been argued that joint enterprise operates as a kind of criminal justice ‘drag-net’, sweeping up large numbers of young people into criminal prosecutions on the basis of their social networks and associations rather than any active involvement in criminality.

Joint enterprise: the law

Guidance issued by the Crown Prosecution Service (CPS) in 2012 described three main types of joint enterprise:

- 1 Where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals.
- 2 Where D assists or encourages P to commit a single crime.
- 3 Where P and D participate together in one crime (crime A) and in the course of it P commits a second crime (crime B) which D had foreseen he might commit.

The second and third of the above categories concern the assignment of secondary or ‘accessorial’ liability for a criminal offence. Cases involving an accessory accused of assisting or

encouraging a principal defendant (category 2) are often described in terms of ‘basic’ or ‘general’ accessorial liability. Where the principal’s commission of a second offence arose out of an original joint offence (category 3), this is commonly denoted ‘parasitic accessorial liability’ (henceforth PAL). The concept of PAL developed over the course of the past three decades through case law. At the heart of PAL is the principle that defendants’ liability could rest on their **foresight** of a **possible** collateral offence committed by their co-defendant. This principle has been roundly criticised for permitting defendants to be convicted of offences in relation to which they had no intent and no intent to assist or encourage, and in the commission of which they were not involved.

In October 2015, a joint session of the UK Supreme Court and Privy Council heard two appeals against joint enterprise convictions for murder: *R v Jogee* and *Ruddock v The Queen (Jamaica)*.¹ Both appeals were allowed, in a decision that effectively abolished PAL. In the judgment handed down on 18 February 2016, it was stated that the common law on joint enterprise had previously taken a ‘wrong turn’: the courts should not have treated defendants’ foresight of an offence as equivalent to intent to assist that offence, and this had had the effect of over-extending the scope of secondary liability. The *Jogee and Ruddock* judgment was also critical of the way in which ‘generalised and questionable policy arguments’ had contributed to the development of the law.

Joint enterprise: the practice

This study was launched in the summer of 2015, against the backdrop of controversy about joint enterprise, and an almost complete lack of systematic information about its application. The aim of the study was to find out more about how, in practice, the doctrine of joint enterprise was utilised in the prosecution of serious offences. To this end, we conducted an analysis of a sample of Crown Prosecution Service (CPS) case files and associated court transcripts. The sampled files, of which there were 61 in total, concerned multi-defendant prosecutions for robbery, section 18 assault (wounding/causing grievous bodily harm with intent) and murder.

Of the 61 cases in the sample, 34 involved allegations of robbery, 15 allegations of section 18 assault and 12 allegations of murder. A total of 157 defendants were charged with these principal offences. In just over one-third of the cases, two or more defendants were ultimately convicted of the same principal offence of robbery, section 18 assault or murder. 15 cases concluded with a single defendant being convicted of the principal offence, while in 10 cases there were convictions for lesser offences only, and 13 cases resulted in no convictions, following withdrawal of charges or acquittals. Almost two-thirds of the defendants in the sampled cases were aged under 25. Of defendants for whom ethnicity was known, around two-thirds were from minority ethnic groups and over 40% were black.

The sampled cases featured a mix of opportunistic and planned acquisitive crime, assaults and fights in the context of fraught or fractured family and other interpersonal relationships,

¹[2016] UKSC 8; [2016] UKPC 7

and serious group and apparently gang-related violence. Robberies, assaults and other violence had taken place in streets, in pubs, in private homes and elsewhere, and defendants and/or victims were often under the influence of drugs and alcohol at the time. In some cases, the distinction between victims and offenders was blurred; and in two cases co-defendants were also victim and offender in relation to certain charges faced. Defendants frequently faced multiple charges relating to the same or different incidents, and not uncommonly had other charges pending; and most had previous convictions.

In the vast majority of the cases, the prosecution proceeded on the basis that the defendants had acted as joint principals in the offence and/or at least one defendant had provided assistance or encouragement to others (general accessorial liability). Only three cases appeared to involve some element of PAL, and in each of these cases other bases of secondary liability were also under consideration.

Across much of the sample it appeared that the prosecution did not disentangle the respective role of each individual accused of taking part in the offence. Under the doctrine of joint enterprise, such absence of precision over defendants' roles is not in itself a bar to conviction: conviction depends on proving a defendant's liability for the offence in question, but there is no need to establish whether that liability was on a principal or accessory basis.

Looking ahead

The Supreme Court's ruling in *Jogee and Ruddock* means that defendants can now be convicted as accessories to an offence only if they acted to 'aid, abet, counsel or procure' the commission of the crime with the intent to do so. Defendants' foresight of the possibility that their associate would commit the offence can no longer be treated as equating to intent, although foresight can be regarded as evidence of intent. It is to be hoped that this judgment will substantially reduce the potential for miscarriages of justice and perceived 'drag-net' prosecutions under the joint enterprise doctrine. However, we do not yet know the full implications of the ruling. Moreover, damage has been done to the legitimacy of the judicial process by the way the doctrine developed and was applied in recent years. Recovery from the deficit in legitimacy will doubtless take time.

Meanwhile, constructive debate on the subject of joint enterprise is likely to be hampered by continuing misperceptions and misunderstandings of this difficult aspect of the criminal law. Even if the Supreme Court judgment goes some way towards simplifying the law on joint enterprise, questions of how and why principal and accessorial liability are ascribed in serious cases remain complex in terms of both legal doctrine and practical effect. Furthermore, there are currently no provisions for routine recording and monitoring of cases involving forms of joint enterprise, and hence the information gap remains large.

There is an urgent need to address this information gap, and to achieve greater clarity and transparency in the prosecution of joint enterprise cases. It is also evident that, following the significant correction that has been made to the law on accessorial liability, there is both more urgency and more opportunity associated with the task of making the prosecution rationale

clearer and more transparent. Success in this task will increase the chances that individuals directly involved in multi-defendant cases (that is, the defendants themselves, as well as complainants, witnesses and bereaved family members of victims) will understand the prosecution case against the defendant and, potentially at least, will view the prosecution process as legitimate. Clarity and transparency are also of critical importance to criminal justice practitioners, who can only apply the law in a fair and consistent manner if they have a precise and shared understanding of it and knowledge of how it is working on a day-to-day basis.

Recommendations for enhancing clarity and transparency in the prosecution of joint enterprise cases

Charging decisions and recording

1. The CPS should ensure that, in all cases in which multiple defendants are charged with the same principal offence, the alleged basis of liability is identified and recorded on file. This should entail recording:
 - a) whether each defendant is charged as a principal, accessory or either;
 - b) for each defendant charged as a (possible) accessory, the basis of this.
2. Recording of alleged principal and/or accessorial liability should be updated where charges are amended and (if applicable) at point of conviction.
3. A review should be undertaken to support the trialling and development of the new charging and recording process outlined above, and to monitor prosecutions.

Communications

4. As part of current development of the Common Platform for digital management of case information across the criminal justice system, provision should be made for collation and publication of national figures on cases in which multiple defendants are convicted of the same principal offence.
5. Better identification and recording of the basis of liability as alleged against each defendant should help to ensure that practitioners fulfil their existing obligations to keep defendants and complainants, and others involved in the case, fully informed about charges.
6. The Sentencing Council should issue guidance to judges on appropriate ways to cover issues of principal and accessorial liability in the delivery of sentencing remarks.
7. The courts, the CPS and other bodies should avoid use of the now toxic phrase ‘joint enterprise’ in future, and consideration should be given to the development of an alternative terminology.

Sentencing

8. The Sentencing Council should consider providing guidance on the sentencing of multiple offenders whose specific roles with respect to the offence(s) are not known.
9. In passing sentence, judges have limited capacity to reflect differing levels of culpability of defendants convicted of murder on an accessory basis. The mandatory life sentence for murder should be reviewed.

1. Introduction

This report presents the findings of an exploratory study on the subject of ‘joint enterprise’. Broadly defined, joint enterprise is a doctrine of criminal law which permits two or more defendants to be convicted of the same criminal offence in relation to the same incident, even where they had different types or levels of involvement in the incident. Our study has sought, through a review of the law and close examination of a sample of cases which came before the Crown Court in 2015, to understand how the doctrine of joint enterprise is deployed over the course of the judicial process. We hope that the findings of the study will help to bring greater clarity and transparency to the criminal justice system’s handling of joint enterprise cases, and thereby contribute to fairer and more consistent and legitimate processes and practices. The timing of this report – produced in the wake of the significant Supreme Court judgment in February 2016 in the joint enterprise cases of *Jogee* and *Ruddock* – ensures that it can have a real impact on a fast-evolving area of the criminal law.

1.1 Background

With funding from the Nuffield Foundation, the Prison Reform Trust and the Institute for Criminal Policy Research at Birkbeck, University of London, launched this project in the summer of 2015, at a time of growing controversy about the doctrine of joint enterprise and the ways in which it was being applied. Strong criticisms of both principle and practice have been voiced by lawyers, members of the judiciary, academics, politicians and penal reformers, as well as by individuals prosecuted in joint enterprise cases and their supporters.

Criticisms of joint enterprise

Most criticisms of joint enterprise have focused on what is said to be the potential for individuals to be convicted and sentenced, under the doctrine, for the most serious offences on the basis of highly peripheral involvement in the criminal acts. It is argued that in many such cases the level of participation in the offence is so slight, or the evidential threshold of conviction so low, that the conviction amounts to a substantial injustice. These include, for example, cases in which individuals are said to have been convicted on the basis of presence at the scene of an offence rather than active involvement in it; or where it is said that an apparent prior association between co-defendants was deemed sufficient evidence of shared criminal intent.

The application of joint enterprise in cases of murder is viewed by many as especially problematic, because of the mandatory life sentence that must be imposed on all convicted of this offence. Commentators and campaigners have also frequently argued that children and young people, and particularly those from black, Asian and minority ethnic (BAME) groups, are disproportionately affected or are explicitly targeted by joint enterprise convictions in cases of presumed gang-related violence. It has been argued that joint enterprise operates as a kind of criminal justice ‘drag-net’, sweeping up large numbers of young people into criminal prosecutions on the basis of their social networks and associations rather than any active

involvement in criminality.² Moreover, survey research conducted in 2010 found public resistance to the notion that an accessory could be convicted of murder on the grounds of involvement in the lethal act which fell short of physical participation (Mitchell and Roberts, 2010).

It does not follow from these serious and abiding concerns that joint enterprise, as a matter of general principle, is necessarily flawed. For centuries, it has been an established and relatively uncontentious aspect of the criminal law of England and Wales that an individual who has intentionally assisted or encouraged another to commit an offence can be held liable for that offence; and that both individuals can be convicted even if it is not known which of them committed the essential act and which was the 'accessory'.

However, case law evolved in such a way over the past few decades that the very definition of what constituted acting as an accessory broadened far beyond the giving of direct encouragement or assistance for the offence under consideration. At the same time, the ways in which the law was applied became ever more complex, convoluted and contradictory, to the extent that uncertainty and misapprehensions abound - on the part of legal practitioners and laypeople alike. Reflecting the breadth and increasing complexity of the law, cases which involve some form of joint enterprise are not routinely recorded as such, meaning that very little official data are available on numbers and types of cases in which the doctrine has been applied.³

Efforts to tackle the problems of joint enterprise

Concerns about 'secondary liability' – a concept closely related to joint enterprise, whereby a secondary offender is held liable for an offence committed by a principal offender – were discussed in detail in a report by the Law Commission published in 2007, *Participating in Crime*. Noting that secondary liability is 'a doctrine characterised by uncertainty and incoherence' (2007: 4), the Commission made the case for the introduction of a statutory scheme of secondary liability; this proposal was not, however, acted upon by government.

In 2011, a House of Commons Justice Committee inquiry into joint enterprise was undertaken, at the same time as campaigning groups were raising significant concerns about the operation of the doctrine and arguing that the current state of the law was leading to miscarriages of justice. The report on the inquiry concluded that the current lack of clarity relating to the doctrine of joint enterprise was 'unacceptable for such an important aspect of the criminal law', and that there was therefore a need for the doctrine to be 'enshrined in legislation' (House of Commons Justice Committee, 2012: para 36). Another of the recommendations of the

² See, for example, House of Commons Justice Committee (2012; 2014), Bridges (2013), Bureau of Investigative Journalism (2014), Crewe et al (2015), Just for Kids Law (2015), Williams and Clarke (2016).

³ However, the CPS has provided data on numbers of multi-defendant homicide cases. CPS figures cited in a report by the Bureau of Investigative Journalism, produced in response to a Freedom of Information Act request, reveal that from 2005 to 2013 inclusive, 4,590 individuals were prosecuted in homicide cases involving two or more defendants, while 1,853 people were prosecuted in cases involving four or more defendants. As a separate exercise, the CPS conducted its own review of records on its Case Management System, which found that over the years 2012 to 2013 a total of 260 multiple-defendant murder and manslaughter cases were prosecuted. A total of 893 defendants were charged in these cases (https://www.cps.gov.uk/publications/performance/joint_enterprise/).

Select Committee report was that the Director of Public Prosecutions issue guidance on joint enterprise charging decisions; this was produced in December 2012 (CPS, 2012).

In the absence of steps towards legislative reform, but amid continuing concern about joint enterprise, a short follow-up inquiry was conducted by the Justice Committee. The Committee reported at the end of 2014 that the evidence submitted to the inquiry had ‘increased our disquiet at the functioning of the law’, and pointed to the urgent need for clear and comprehensive recording of information on joint enterprise. Alongside the Law Commission and parliamentary discussions of secondary liability and joint enterprise, academic lawyers and criminologists continued to grapple with the issues,⁴ as did other commentators⁵ and the Court of Appeal.⁶ The subject was increasingly brought to wider public attention through campaigning activities: most notably, those of JENGbA (Joint Enterprise: Not Guilty by Association), a group set up in 2010 by families of people imprisoned under the joint enterprise doctrine.⁷ A campaigning drama about joint enterprise written by Jimmy McGovern, *Common*, and a documentary, *Guilty by Association*, were both broadcast by the BBC in July 2014.

The changing law

While this study was under way, in October 2015, a joint session of the UK Supreme Court and Privy Council heard two appeals against joint enterprise convictions for murder: *R v Jogee* and *Ruddock v The Queen (Jamaica)*.⁸ Discussion of this judgment will follow in Chapter 2; but here it should be noted that the Supreme Court allowed both appeals, stating that the common law on joint enterprise had previously taken a ‘wrong turn’ by over-extending the scope of liability for secondary parties. The precise ramifications for joint enterprise of the judgment in *Jogee and Ruddock* – which was handed down on 18 February 2016 – remain to be seen. It may go a significant way towards meeting concerns about criminalisation and over-charging of individuals on the fringes of criminal activity; it may also, in time, help to reduce some of the complexities and incoherence of the law.

The Supreme Court has sought to dampen any expectations of individuals claiming to have been wrongfully convicted under joint enterprise that the Court of Appeal will look afresh at their convictions in light of the *Jogee* and *Ruddock* ruling. The judgment reiterates the general rule that criminal convictions outside the time limit for appeal could be challenged only where the Court of Appeal grants ‘exceptional leave’ on the grounds of ‘substantial injustice’.⁹ It also

⁴ For example, Bridges (2013), Crewe et al (2015), Dyson (2015a, 2015b), Krebs (2010, 2015), Parsons (2012), Virgo (2012), Wilson and Ormerod (2015).

⁵ Bureau of Investigative Journalism (2014), McFadyean (2013), Rozenberg (2015), Williams and Clarke (2016).

⁶ The BIJ investigation of joint enterprise (2014) found that, in 2013, 43 out of 194 (22%) of published Court of Appeal rulings on convictions had involved some element of joint enterprise.

⁷ <http://www.jointenterprise.co/>

⁸ [2016] UKSC 8; [2016] UKPC 7.

⁹ ‘The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction. Moreover, where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such leave, and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken.’ (para 100)

states that the ‘correction’ to the law that has now been made does not in itself mean that prior convictions were substantially unjust.¹⁰ At the time of writing, two Court of Appeal hearings are shortly to be held to consider a number of conjoined applications for leave to appeal in light of the *Jogee* and *Ruddock* judgment.

1.2 The study

In the context of the ongoing controversy about the doctrine of joint enterprise, and lack of systematic information about its application, this study was initiated with the aim of finding out more about how, in practice, the doctrine was utilised in the prosecution of serious offences. To this end, with the permission of the Director of Public Prosecutions, we conducted an analysis of a sample of Crown Prosecution Service (CPS) case files and associated court transcripts. The sampled files concerned multi-defendant prosecutions for robbery, section 18 assault (wounding/causing grievous bodily harm with intent) and murder. Since no previous study had attempted a detailed review of a cross-section of joint enterprise cases, this research was conceived, from the outset, as exploratory in nature.

Methods

Our sample of CPS case files was identified through the following process:

- a) The CPS randomly selected 125 cases which met the following criteria:
 - Primary offence charged was **robbery, section 18 assault or murder**
 - **Two or more defendants** charged with the primary offence
 - Case had proceeded at least as far as an **initial Crown Court hearing**
 - Case was finalised (i.e. case discontinued, defendants acquitted, or defendants convicted and sentenced) over a specified **four-month period in 2015**
 - Case was dealt with by **CPS London**
- b) After we reviewed the list produced by the CPS, we requested that they obtain the (paper) files for around 90 cases. Since robbery cases made up the large majority of those identified, we asked that section 18 and murder cases be prioritised among the files obtained.
- c) Of the case files obtained, we excluded those which, on initial examination, were found not to meet the above criteria (e.g. where the offence type had been wrongly identified in the original list) and those where the documents held on file were insufficiently detailed to provide a clear picture of the case.

¹⁰ It has, however, been argued by Buxton (2016: 333) that the ruling does not so much ‘change the law as applied in earlier cases’ as ‘say that the law applied in the earlier cases was wrong from the beginning’; and for this reason ‘it would surely be unacceptable to deny the possibility of correction to other persons affected by that injustice: particularly when they are serving long sentences of imprisonment’. Buxton also notes that, while estimates vary, it has been suggested that around 300-500 people are serving life sentences having been convicted of murder following jury directions in line with the Chan Wing-Siu principle.

The above process produced a total sample of 61 cases. For each case in the sample, we entered on a spreadsheet details of the allegations made against the accused, charging decisions, court hearings and outcomes, and the backgrounds and circumstances of all defendants and (alleged) victims, including the nature of any relationships between the various parties.¹¹ We also took note of references to 'joint enterprise' or use of similar terminology in the documentation. For around half of the cases (selected on the basis that they had proceeded to trial and/or sentencing and appeared to raise some particularly interesting or challenging issues in relation to joint enterprise), we obtained the transcript of the judge's summing up and/or sentencing remarks. We reviewed all transcripts, paying particular attention to judicial references to joint enterprise. Analysis of the material collated from the case files and transcripts entailed developing and populating a series of typologies of cases and outcomes.

Focus of the study

The case review described above produced a unique dataset comprising detailed information about the individual (alleged) offences, defendants and (alleged) victims, the prosecution process, and its outcomes. As such, and as will be demonstrated over the course of this report, the dataset provides real insight into how joint enterprise is understood, deployed and referred to within the different constituent parts of the criminal justice process, and into the kinds of complex and confused scenarios of conflict and violence with which the law on joint enterprise grapples.

There are, however, limitations to the dataset. First, the number of sampled cases, at 61, is small – representing only a fraction of multi-defendant robbery, violence and homicide cases dealt with by CPS London in the study period. Over these four months, a total of 419 multi-defendant cases involving offences against the person (of all levels), 116 multi-defendant robbery cases and 20 multi-defendant homicide cases (predominantly murder and manslaughter) were completed in London.¹² The small size of the sample necessarily limits the extent to which generalisations can be drawn about the nature of joint enterprise cases and the ways in which they are dealt with by the authorities. Further, even for the relatively low number of cases in the sample, the information we obtained was not complete. The files contained little data on police investigations; and other information on the prosecution – particularly on the details of prosecutor decision-making – was often lacking, due in part to the increasing digitisation of documentation and the fact that we had access to paper files only.

Reflecting the exploratory nature of the study as a whole, we have not sought to reach general conclusions about the extent or nature of any injustice in joint enterprise prosecutions and convictions. Rather, we believe our findings can be used to the greatest effect by

¹¹ Documents on file from which we collated this information included completed MG3 (charging decision) forms, indictments, court minute sheets, records of previous convictions, prosecution instructions, defence statements, applications for special measures, witness statements, police interview transcripts. The completeness of CPS files varied widely; and in some cases, where information on file was lacking, additional information was obtained from the Lawpages website (<http://www.thelawpages.com/>) and from press reports of cases.

¹² The multi-defendant offences against the person cases were 5% of all offences against the person cases completed in London in the study period; the multi-defendant robbery cases were 27% of all robberies; the multi-defendant homicide cases were 35% of all homicides. (The information on case numbers was provided by CPS London to the researchers for the purpose of this study on 1.12.15.)

demonstrating the need for clarity and transparency in the way that the doctrine of joint enterprise is applied throughout the judicial process: a need that is all the more urgent at a time when, following the Supreme Court decision in *Jogee and Ruddock*, the very scope and reach of the law is changing. The timing of this report is such that it can have a real and significant impact on the understanding, reporting and monitoring of joint enterprise in the future.

The study benefitted from the guidance of an advisory group convened by the Prison Reform Trust comprising experienced and authoritative individuals from the Metropolitan Police Service, the CPS, the campaigning group JENGbA, the legal profession, the Ministry of Justice and academia. The membership of the advisory group is listed in the Appendix to this report. While the advisory group provided assistance with the study for which we are very grateful, we alone are responsible for the content of this report, including the recommendations.

Structure of the report

This report has five chapters. Following this introduction, Chapter 2 will discuss the law relating to joint enterprise – including the implications of the *Jogee and Ruddock* judgment – and will also consider the policy background. Thereafter, Chapter 3 will look at the findings of our review of joint enterprise case files. We will describe the cases in terms of their outcomes, the characteristics of defendants and alleged victims, and what is known about the nature and circumstances of the alleged offences. We will also examine how the doctrine of joint enterprise was applied in the prosecution of the sampled cases; in so doing, we will consider the terminology of joint enterprise as it was utilised in the cases.

Chapter 4 will then draw some conclusions from the preceding discussion and will make the case for greater clarity and transparency in the handling of joint enterprise cases; we will also present some recommendations for how this might be achieved. Finally, a short series of case studies drawn from our sample of joint enterprise cases will be presented in Chapter 5. These case studies were selected to illustrate some of the most challenging aspects of the prosecution process, and cases represented here are therefore among the most serious in our sample. A glossary at the end of the report defines some of the frequently used legal terms.

2. Joint enterprise: law and policy

The introduction to this report outlined in broad terms the meaning of joint enterprise and some of the controversy that has surrounded this legal doctrine. In this chapter we will look more closely at the components of the law relating to joint enterprise.

2.1 Dimensions of joint enterprise

In considering what exactly joint enterprise is, it is perhaps helpful to start by noting what it is **not**. Joint enterprise is not a specific law, or a type of offence. No offender can be ‘convicted of joint enterprise’ – rather, an offender can be convicted of any of a wide range of offences under the joint enterprise doctrine.

Joint enterprise should be regarded as a general principle or doctrine which evolved largely through common law rather than statute. Reflecting its basis in common law, and the complicated and confused nature of much of what it deals with – that is, alleged group offending – the very definition of joint enterprise has been much disputed. Wilson and Ormerod noted, for example, that ‘A striking illustration of the unsatisfactory state of the law is that we cannot confidently describe the precise scope of joint enterprise liability’ (2015: 4). Ashworth, in his evidence to the first Justice Committee inquiry on joint enterprise, described the law as:

replete with uncertainties and conflict. It betrays the worst features of the common law: what some would regard as flexibility appears here as a succession of opportunistic decisions by the courts, often extending the law, and resulting in a body of jurisprudence that has little coherence.

(House of Commons Justice Committee, 2012: para 34)

Joint enterprise thus evolved as an amorphous and contested concept. This helps to explain the fact that, to date, the authorities have not undertaken any kind of routine recording of cases in which the doctrine has been applied and that, consequently, there has been a profound lack of information about the scale and scope of joint enterprise cases across the criminal justice system.

A broad definition of joint enterprise

For the purposes of this study, we have adopted the broadest definition of joint enterprise. We are defining it as a doctrine which allows two or more parties to be convicted of the same offence, whether each had played an equal part in committing the criminal act or one was the principal offender and others had played secondary roles. This is the definition used by the CPS in guidance issued in 2012 on joint enterprise charging decisions. In the *Jogee and Ruddock* judgment, the Supreme Court observed that ‘the expression “joint enterprise” is not a legal term of art’ and that ‘it is used in practice in a variety of situations to include both principals and accessories’ (para 77).

The 2012 CPS guidance – which is currently being revised to reflect the *Jogee and Ruddock* ruling – set out three main ‘types of joint enterprise’, with reference to the Court of Appeal judgment in the case of *R v ABCD*.¹³ The three types of joint enterprise were described in the guidance as:

1. Where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals.
For example, if P1 and P2 both break into a house and take items of property, both could be convicted of burglary as joint principals.
2. Where D assists or encourages P to commit a single crime.
For example, if P broke into a house and took items while D acted as look-out, both could be convicted of burglary with P as a principal and D a secondary party.
3. Where P and D participate together in one crime (crime A) and in the course of it P commits a second crime (crime B) which D had foreseen he might commit.
For example, if P and D broke into a house in order to steal from it, and in the course of the burglary were disturbed by the householder whom P killed (with intent to kill or do serious harm), P could be convicted of murder as the principal while D could be convicted as a secondary party, if he had foreseen that P might commit such an act.

The first of the above three scenarios, where the defendants are joint principals, does not pose any particular problems in terms of the law of joint enterprise. The only potentially contentious point here is whether the term ‘joint enterprise’ should in fact be applied in such a case.

The criticisms of joint enterprise have tended to arise with reference to cases falling into the second and, particularly, the third category. Both these categories concern the assignment of secondary or ‘accessorial’ liability. Cases involving an accessory accused of assisting or encouraging a principal defendant (scenario 2) are often described in terms of ‘basic’ or ‘general’ accessorial liability (or ‘traditional secondary liability’). Where the principal’s commission of a second offence arose out of an original joint offence (scenario 3), this is commonly denoted ‘parasitic accessorial liability’. Parasitic accessorial liability was the focus of the Supreme Court judgment in *Jogee and Ruddock* and – as will be discussed below – was effectively abolished by it.

Overlapping categories

In both principle and practice, there are few clear-cut boundaries between the scenarios in which defendants are joint principals or are ‘general’ or ‘parasitic’ accessories. As a matter of law, if a defendant is to be convicted, his liability for the offence must be proven by the prosecution, but the prosecution need not establish whether that liability was on a principal or accessory basis. In other words, a defendant can be convicted if the jury is satisfied that he **either** committed the offence as a principal **or** was an accessory, but is unable to determine which of these was the case.

¹³ [2010] EWCA Crim 1622

Often it may simply be impossible for the prosecution to disentangle (and indeed the defendants themselves may be unable to disentangle) the respective role of each individual accused of taking part in a group offence. For example, in a case of a group assault it may be unclear – including to the protagonists themselves – whether some assisted or encouraged others to inflict violence or whether all committed the assault together. In other cases, it may be clear that one defendant was a principal and another an accessory (for example, if there is evidence that one person committed a robbery while another acted as a get-away driver), but it may not be known which of the defendants played which role.

In these kinds of circumstances, in other words, the absence of precision over the roles of the parties is not – in itself – a bar to conviction. For the judge at the point of sentencing, the lack of precision may, however, hinder the determination of each defendant’s level of culpability and thus the precise sentence that should be passed. The overlap – or porousness of boundaries between – the different types of joint enterprise also makes more challenging the task of recording and monitoring the use of the doctrine.¹⁴

2.2 General and parasitic accessorial liability

While the concept of joint principal liability is relatively straightforward, secondary or accessory liability – in both its ‘general’ and ‘parasitic’ forms – is more complex.

General accessorial liability

What is often described as general accessorial liability covers the situation in which a defendant is said to have assisted or encouraged a principal defendant. This dimension of joint enterprise, although it first emerged through common law, was given statutory force by section 8 of the Accessories and Abettors Act 1861 (as amended by the Criminal Law Act 1977), which provides that anyone who ‘shall aid, abet, counsel or procure the commission of any indictable offence ... shall be liable to be tried, indicted and punished as a principal offender’.¹⁵ As expressed by the Law Commission (2007: para 2.2), under section 8:

a person who, with the requisite state of mind, aids, abets, counsels or procures another person to commit an offence is him or herself guilty of that offence (provided that the offence is subsequently committed). Accordingly, D is liable to the same stigma and penalties as P.

What exactly constitutes ‘aiding, abetting, counselling or procuring’ has been understood in a variety of ways. The 2010 edition of the Crown Court Bench Book,¹⁶ which provides guidance

¹⁴ As, for example, was made clear by then Director of Public Prosecutions Keir Starmer in his oral evidence to the Justice Committee’s inquiry on joint enterprise in 2011.

¹⁵ A related statute is the Serious Crimes Act 2007, sections 44-46 of which created three ‘inchoate’ offences of intentionally encouraging or assisting an offence; encouraging or assisting an offence believing it will be committed; and encouraging or assisting offences believing one or more will be committed. These provisions allow people who help others to commit an offence to be prosecuted regardless of whether the substantive offence is actually committed or attempted. An older statutory provision relevant to the prosecution of group offending is section 1(1) of the Criminal Law Act 1977 which created the offence of statutory conspiracy.

¹⁶ Since superseded by the publication, in May 2016, of the *Crown Court Compendium: Part 1: Jury and Trial Management and Summing Up*, which includes revised guidance on secondary liability in light of *Jogee and Ruddock* (Judicial College, 2016).

to judges on directing juries, defined the terms by way of the following classification of 'routes to principal or secondary liability':

Legal liability for a criminal offence may arise because the defendant:

- (i) (a) either alone or through the innocent agency of another or in combination with another committed the offence (principal or joint principal);
(b) took part in the offence as a secondary party (**aiding and abetting**);
- (ii) by his own conduct and with intent assisted another to commit the offence (**aiding and abetting**);
- (iii) by words, conduct and/or presence, intentionally encouraged another to commit the offence (**aiding and abetting**);
- (iv) directed or, with the requisite intention, enabled the offence committed (**counselling or procuring**);
- (v) joined and participated in an enterprise to commit one offence in the course of which, as the defendant either intended or realised, the other offence would or might be committed (joint enterprise).

(Judicial Studies Board, 2010: 57-8; emphases added).

The above classification encompasses not only general but also joint principal (number 1a) and parasitic accessorial (number 5) liability. It can thus be seen as a more detailed explication of joint enterprise than the three-fold CPS category outlined in the preceding chapter. While the specific term 'joint enterprise' is applied only to the fifth of the items in the above list, the term is used in a broader sense elsewhere in the document.

Parasitic accessorial liability

The dimension of joint enterprise commonly known as parasitic accessorial liability (henceforth PAL) developed over the course of the past three decades solely through case law. As noted above, it concerns the liability of accessories for a further or collateral offence (crime B) committed by the principal defendant in the course of an initial crime or criminal venture in which all participated (crime A).

Among many cases which were significant in the development of PAL, the most prominent was *Chan Wing-Siu v R*.¹⁷ This case, originating in Hong Kong, concerned a fatal stabbing committed in the course of an armed robbery, in relation to which three defendants were convicted of murder. The trial judge had directed the jury that an accomplice could be guilty of murder if he had foreseen that his co-defendant might stab the victim intending to do serious harm. An appeal against the convictions was subsequently dismissed by the Privy Council, for whom Sir Robin Cooke stated:

¹⁷ [1985] 1 AC 168.

The case must depend ... on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. ... The criminal liability lies in participating in the venture with that foresight.

The principle that a defendant's criminal liability could rest on his **foresight** of a **possible** collateral offence committed by his co-defendant (which became known as the Chan Wing-Siu principle) was strengthened and elaborated through a number of subsequent cases.¹⁸ This principle is at the heart of PAL, and has been deemed highly problematic on a variety of grounds, including:

- It permits or even encourages a practice of overcharging by prosecutors, since it provides a rationale for charging individuals with no more than a loose association (such as a presumed 'gang' association) with criminal activity or a principal defendant.
- It leads to lengthy trials and excessively complicated 'routes to verdict' for jurors, detailing alternative approaches to determining each defendant's liability, which in turn increases the likelihood of jurors reaching verdicts with poor understanding of the issues at stake.
- It allows defendants to be convicted of an offence in relation to which they had no intent and no intent to assist or encourage, and in the commission of which they were not involved, since their liability could rest solely on their involvement in the original criminal venture (the conduct or actus reus element) combined with foresight of the possibility (the mental or mens rea element) that the collateral offence would be committed.¹⁹
- Where the collateral offence is murder, a higher threshold of culpability has to be satisfied for the principal defendant to be found guilty (he must have killed with intent to kill or cause serious injury) than for the accessory to be found guilty (he could have simply foreseen that the principal defendant might kill with intent to kill or cause serious injury).
- Since the life sentence is mandatory for all who are convicted of murder, the accessory found guilty on the basis of foresight of the possibility of the offence must, like the principal, receive a life sentence.

Because of the particular concerns about PAL and its practical implications, much of the commentary on joint enterprise has focused specifically on this dimension of the wider doctrine: PAL was, for example, the focus of the Justice Committee inquiries. Indeed joint enterprise has frequently been **defined as** PAL – as by Krebs (2015: 482-3) who makes a distinction between 'a co-perpetrator or "ordinary" accessory (who aids, abets, counsels, or procures P's crime)' and 'those charged under the doctrine of joint enterprise [who] will not have actively participated in or assisted or encouraged the commission of P's crime'.

¹⁸ Including *R v Hyde* [1991] 1 QB 134, *R v Powell and R v English* [1999] 1 AC 1, *R v Rahman* [2008] UKHL 45; [2009] 1 AC 129.

¹⁹ Although an established defence in these circumstances was where the further offence amounted to a 'fundamental departure' from the original criminal venture, or where the defendant had clearly 'withdrawn' from the venture before the further offence was committed.

Relationship between general and parasitic accessorial liability

Whether general and parasitic accessorial liability are seen as two dimensions of the overarching joint enterprise doctrine or as more distinct from each other, the relationship between them is complicated by the role of foresight in ascribing secondary liability. According to Dyson (2015b), the 1990s saw the extension of the principle by which an accessory was required merely to have foresight of a principal's actions from PAL cases to cases involving general accessorial liability.²⁰ Accordingly, where an accessory had had **foresight** of how his actions aided, abetted, counselled or procured an offence committed by another, this was treated as equivalent to **intention** to aid, abet, counsel or procure on the part of the accessory.

The relationship between general and parasitic accessorial liability is also complicated by the fact that it may be a matter of interpretation whether a criminal venture comprised different constituent parts (a crime A and a crime B) or was essentially a single offence. This could arise, for example, where two defendants jointly participated in an assault, in the course of which one intentionally killed the victim. In these circumstances, the accessory could be prosecuted on the grounds that he had helped or encouraged the principal to commit the murder (general accessorial liability). On the other hand, the murder could be deemed a collateral offence (crime B) emerging out of an initial assault (crime A) – in which case the accessory's prosecution for murder might rest on his foresight of this possible outcome when he participated in the assault (PAL). In practice, the prosecution might proceed, and a conviction might be secured, on the basis of either of these two scenarios or some kind of amalgam of the two. This again demonstrates that – as noted above – a lack of precision about the foundations of a defendant's liability would not necessarily, in itself, hamper prosecution, although it may make more difficult the judge's task of determining the sentence for each convicted offender.

2.3 The Supreme Court judgment – *Jogee and Ruddock*

The cases of *Jogee* and *Ruddock* both involved appeals against convictions for murder on the basis of PAL. Jogee's conviction arose from the fatal stabbing of Paul Fyfe, in Fyfe's home, by Jogee's friend and co-defendant Hirsi. The stabbing had followed a confrontation between Hirsi and Fyfe, during which Jogee shouted encouragement to Hirsi to do something to Fyfe, and had himself threatened Fyfe with a bottle. Ruddock had been convicted for the murder of Peter Robinson, a taxi driver in Montego Bay, Jamaica, whose throat had been cut in the course of a robbery alleged to have been committed by Ruddock and the principal defendant, Hudson.

The Supreme Court's judgment focused on whether the Chan Wing-Siu principle – according to which the secondary party's liability for crime B could rest on his foresight that the principal might commit it in the course of their joint involvement in crime A – could be supported. This principle was applied in jury directions in both the original murder trials. Having considered the evolution of the criminal law in relation to PAL, the Supreme Court unanimously decided

²⁰ See also the *Crown Court Bench Book* (JSB, 2010: 61-64).

that the law had taken a 'wrong turn' in *Chan Wing-Siu* and related cases, and therefore set aside the two murder convictions.

The 'wrong turn', according to the Supreme Court, entailed the unjustified creation of a new and separate form of secondary liability: that is, the form of secondary liability which became known as PAL. This was based on the fundamental 'error' of treating a defendant's **foresight** of an offence as equivalent to his **intent to assist** that offence, and thereby over-extending the scope of secondary liability. The judgment states that foresight should no longer be regarded, in and of itself, 'as an inevitable yardstick of common purpose', but that it nevertheless remains legitimate 'to treat [foresight] as **evidence** of intent' (para 87; emphasis added). An accessory's knowledge of the essential matters or background facts relating to the principal's criminal act may therefore be central to consideration of the accessory's intent: for example, 'Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more' (para 98).²¹

Effects of Jogee and Ruddock judgment

The *Jogee and Ruddock* judgment thus has the effect of abolishing PAL and returning the law on secondary liability to how it stood prior to the *Chan Wing-Siu* case. What this means, in essence, is that a defendant can now be convicted as an accessory only if he acted in some way to 'aid, abet, counsel or procure' the commission of the offence with the intent to do so, and no longer will mere foresight of the offence be deemed to equate to that intention.

In other words, the Supreme Court ruling does not have implications for cases involving general accessorial liability, unless that liability hinged on the defendant's foresight of how his actions served to assist or encourage the offence. Nor, of course, does the ruling have any implications for multiple defendant cases in which the defendants were joint principals. As stated in the new *Crown Court Compendium*, it remains the case that a defendant can be found guilty on the basis of being **either** a principal **or** an accessory:

In almost all cases the prosecution will allege that one or more Ds are guilty because he/they must have been either a principal offender or an accessory/secondary party. In such cases it is not necessary for the jury to be satisfied whether any one D was a principal or an accessory, provided that they are satisfied that he participated.

(Judicial College, 2016: 7-3.4)²²

Furthermore, although the ruling effectively abolishes PAL, the judgment makes it clear that this does not entirely rule out a secondary defendant being held liable for the principal defendant's commission of a collateral offence arising out of an original offence in which both were involved (whether as joint principals or as principal and accessory). In such an instance,

²¹ Since the *Jogee and Ruddock* ruling, the relevance of **knowledge** to consideration of intent has been reiterated by the Court of Appeal decision in the case of *R v Anwar and others* [2016] EWCA Crim 551.

²² Indeed, with reference to an example provided by the Compendium, in which the defendants are alleged to have acted as joint principals, it is observed that: 'in reality there will be few cases in which it will not be open to the jury to find that of two Ds, one acted as a principal and one as a secondary party: directions will need to be crafted accordingly' (Judicial College, 2016: 7-3).

however, there now has to be evidence that the secondary defendant had some level of **intent** to assist or encourage the collateral as well as the original offence on which they embarked with a common purpose. It is possible for that intent to be 'conditional': that is, the secondary defendant may have intended the collateral offence to be committed only 'if the occasion arose'. This applies where, for example:

The group of young men which faces down a rival group may hope that the rivals will slink quietly away, but it may well be a perfectly proper inference that all were intending that if resistance were to be met, grievous bodily harm at least should be done.

(para 92)

A scenario such as this involving conditional intent could be described as falling within the scope of general accessorial liability rather than PAL on the grounds that the secondary parties had assisted or encouraged the collateral offence through their participation in the original offence.²³

A final point to note with respect to the Supreme Court judgment is its insistence that it was for the courts to reverse the 'error' in *Chan Wing-Siu* rather than – as had been proposed by others, including the Law Commission – it being a matter for legislation:

As to the argument that even if the court is satisfied that the law took a wrong turn, any correction should now be left to Parliament, the doctrine of secondary liability is a common law doctrine (put into statutory form in section 8 of the 1861 Act) and, if it has been unduly widened by the courts, it is proper for the courts to correct the error.

(para 85)

2.4 Policy pressures and contradictions

A recurring theme in much of the criticism of joint enterprise concerns the extent to which the doctrine has been developed and utilised to further policy goals – particularly the goal of tackling gang-related violence among young people:

joint criminal enterprise liability in its current form may be grounded in a policy that favours a broad approach to condemning group criminal activity in order to deter persons from 'teaming up' and forming joint criminal ventures in the first place

(Krebs, 2010: 602).

Critics have argued that, in the development of the joint enterprise doctrine, policy considerations have improperly taken precedence over legal principle; and that some aspects of the doctrine's operation have in fact undermined the policy efforts that it is intended to support.

The pursuit of policy objectives

The policy relevance of the joint enterprise doctrine was made clear by Sir Robin Cooke in *Chan Wing-Siu* (at p. 177):

²³ If the collateral offence involved the infliction of lethal violence, any accessories would be liable for murder if there was a (conditional) intent that the principal would kill or cause really serious harm. If there was no such intent, the accessories would be liable for manslaughter if they 'intentionally participated in an offence in the course of which V's death was caused and a reasonable person would have realized that, in the course of that offence, some physical harm might be caused to some person' (Judicial College, 7-4.11).

What public policy requires was rightly identified in the submissions for the Crown. Where a man lends himself to a criminal enterprise knowing that potentially murderous weapons are to be carried, and in the event they are in fact used by his partner with an intent sufficient for murder, he should not escape the consequences by reliance upon a nuance of prior assessment, only too likely to have been optimistic.

In the important judgment of *R v Powell* and *R v English*²⁴ (and as pointed out in the *Jogee* and *Ruddock* ruling), Lord Hutton explicitly noted that ‘as a matter of logic’ it might be seen as anomalous that a secondary party could be found guilty of murder on the basis of ‘foreseeability’ of death or serious harm which would not be sufficient mens rea for conviction of the principal. Hutton ruled, however, that ‘the rules of the common law are not based solely on logic but relate to practical concerns’, and that these concerns include ‘the need to give effective protection to the public against criminals operating in gangs.’ On this basis, he stated:

*there are practical considerations of weight and importance related to considerations of public policy which justify the principle stated in Chan Wing-Siu and which **prevail over considerations of strict logic** [emphasis added].*

In the *Jogee* and *Ruddock* ruling, the Supreme Court itself criticised the ‘generalised and questionable policy arguments’ that had contributed to the establishment and elaboration of the Chan Wing-Siu principle in case law. However, these arguments had an obvious political appeal; this was evident, for example, in comments made on BBC Radio 4 on 8 September 2010 by Lord Falconer, former Lord Chancellor. As cited in the BIJ report on joint enterprise (2014: 46), Falconer said:

The message that the law is sending out is that we are very willing to see people convicted if they are a part of gang violence - and that violence ends in somebody's death. Is it unfair? Well, what you've got to decide is not, 'Does the system lead to people being wrongly convicted?' I think the real question is: 'Do you want a law as draconian as our law is, which says juries can convict even if you are quite a peripheral member of the gang which killed?' And I think broadly the view of reasonable people is that you probably do need a quite draconian law in that respect.

The BIJ report argues that this statement amounts to an implicit justification of possible injustice in the name of the greater good.

Joint enterprise and legitimacy

It is clear that the wish to deter group offending, and particularly gang violence, played a part in the development of case law on joint enterprise over recent decades. Whether the law has in fact had a deterrent effect would be near impossible to assess. What is probable, however, is that **perceptions of the injustice** of the joint enterprise doctrine have undermined the legitimacy of the judicial process in the eyes of defendants; and this, in turn, is likely to have reduced rather than increased levels of compliance with the law.²⁵

²⁴ [1999] 1 AC 1

²⁵ The links between perceived legitimacy and compliance have long been demonstrated by the work of procedural justice theorists (see, for example, Tyler, 2006; Hough et al, 2013).

Perceptions of the injustice of joint enterprise may be partly shaped by misunderstandings of what is a highly complex and in many ways confusing aspect of the criminal law. The *Jogee and Ruddock* judgment refers to public misconceptions of the Chan Wing-Siu principle, which is ‘understood (erroneously) by some to be a form of guilt by association or of guilt by simple presence without more’ (para 77). Some campaigning efforts of the police, moreover, may have had the effect of reinforcing such misconceptions.²⁶

As noted at the outset of this report, the greatest concerns about joint enterprise have focused on the scope for individuals to be convicted of serious crimes, and thereby to receive severe sentences, for offences in relation to which they are described as having had no more than highly peripheral involvement. Wilson and Ormerod (2015: 21) refer to individuals convicted of murder on a joint enterprise basis who

are often young men who refuse to accept that the label and sentence they have received fairly reflect their culpability. They remain embittered with the criminal justice system and refuse to engage with the prison system.

Crewe et al (2015) report on a survey of 295 prisoners and interviews with 125 prisoners serving very long sentences from an early age. While the survey did not set out specifically to explore the issue of joint enterprise, it emerged as an important theme in the findings. For example, the researchers found (2015: 266) that interview respondents who had been convicted on a joint enterprise basis

consistently expressed a view that their sentence was in some way illegitimate. Some made outright claims of innocence. More often, they acknowledged that they were guilty of an offence, but did not consider themselves guilty of the crime of murder ... Feelings of injustice associated with joint enterprise liability were also shaped by perceptions that the court process had itself been unfair.

These feelings of injustice, Crewe et al report, have a number of implications – including the prisoners’ sense of disengagement from prison regimes and their reluctance to undertake work to address their ‘offending behaviour’. Crewe et al also found evidence of a greatly disproportionate impact of the joint enterprise doctrine on offenders who were young black men. Of survey respondents convicted under joint enterprise, 37% described themselves as black or black British – compared to the 13% of black prisoners in the general prison population (and the 3% of black people in the national population of England and Wales). Many of the interviewees, according to Crewe et al, ‘felt that joint enterprise was being used as an indiscriminate ethnic vacuum cleaner, convicting them with little regard for natural or procedural justice’ (2015: 268).

A report on how racialized discourses about ‘gangs’ have influenced the criminalisation of young men has also pointed to racial disparities in convictions under the joint enterprise, and argues that

The net effect of criminal justice policies which are designed to ‘disrupt’ and ‘end’ the gang, is the disproportionate punishment of young people from minority ethnic (particularly black) groups while failing to adequately curtail levels of serious youth violence across England and Wales
(Williams and Clarke, 2016: 3).

²⁶ See, for example, descriptions by Bridges (2013) and Williams and Clarke (2016) of Metropolitan Police Service campaigns aimed at deterring youth involvement in gangs which made explicit reference to joint enterprise.

3. Joint enterprise in practice

We outlined, in the introduction to this report, the process by which we selected and reviewed a sample of multi-defendant robbery, section 18 assault and murder cases. This chapter of the report will present the findings of the case review. There are three parts to the discussion. First, we will provide a descriptive account of the cases in terms of their outcomes, the characteristics of the parties, and the nature of the allegations. Secondly, we will consider on what basis the prosecution sought to establish joint enterprise liability in our sampled cases. Thirdly, we will look at how the terminology of joint enterprise was used in the prosecution of these cases.

3.1 The cases

For each case in our sample of 61, we assembled detailed information on the alleged offence, defendants, victim and complainants, charging decision, prosecution process and outcome. This information provides insight into the range of multi-defendant cases which come before the courts and are the essential focus of the doctrine of joint enterprise.

From charge to sentence

We begin this account at the end, by looking at the outcomes of the 61 cases in the sample. Table 3.1 shows that in just over one-third of the cases (23), two or more defendants were convicted of the same principal offence of robbery, section 18 or murder; we refer henceforth to these cases as resulting in 'joint enterprise convictions'. Ten cases concluded with a single defendant being convicted of the principal offence, while in 15 cases there were convictions for lesser offences only, and in 13 cases there were no convictions at all, following withdrawal of charges or acquittals. The table also shows that two-thirds of the murder cases in the sample (8/12) resulted in a joint enterprise conviction.

Of the 23 cases in which there was a joint enterprise conviction for the same principal offence, the large majority (18) involved two defendants being so convicted. In three cases there were three defendants convicted of the same principal offence, and two cases had four defendants convicted.

Turning from an analysis of outcomes by case to an analysis by defendant, we see in Table 3.2 that a total of 157 defendants across the 61 cases were charged with the same principal offence, of whom 63 were convicted of that offence: 53 alongside co-defendants likewise convicted, and 10 as the sole defendant in the case convicted of the principal offence. 47 were convicted of lesser offences.

Table 3.1: Cases and outcomes

Offence	Total number of JE cases 2+ defts charged with same principal offence(s)	Breakdown of case outcomes			
		JE conviction 2+ defts convicted of same principal offence(s)	Non-JE conviction		No conviction All charges withdrawn/defts acquitted
			1 deft convicted of principal offence(s)	Convictions for lesser offence(s) only	
Robbery	34*	11	4	9	10
Sn 18 assault	15**	4	4	5	2
Murder	12	8	2	1	1
Total	61	23	10	15	13

* Including 1 attempted robbery

** Including 2 attempted S18 and 1 conspiracy to commit S18

Table 3.2: Defendants and outcomes

Offence	Total number of defendants* Defts charged with principal offence(s)	Breakdown of defendant outcomes			
		JE conviction Convicted of principal offence(s) with other(s)	Non-JE conviction		No convictions Acquitted or charges withdrawn
			Convicted alone of principal offence(s)	Convicted of lesser offence(s)	
Robbery	82	25	4	23	30
Sn 18 assault	36	8	4	16	8
Murder	39	20	2	8	9
Total	157	53	10	47	47

*Total excludes defendants who were charged with different offences alongside those charged with the principal offences.

The two preceding tables show that the outcomes in the murder cases differ markedly from the outcomes in the other cases. Eight out of 12 murder cases resulted in a joint enterprise conviction, and 20 out of 39 defendants in these cases were convicted on a joint enterprise basis. In contrast, there were joint enterprise convictions in 15 out of all of the other 49 cases, and for 33 of the other 118 defendants. On the basis of the relatively small sample and limited data collected, it is not possible to explain these differences; but the figures should be viewed in the light of the widespread criticisms of how the joint enterprise doctrine was used in murder prosecutions.

Table 3.3 presents defendants' pleas and verdicts. Here we see, for example, that 26 of all the defendants pleaded guilty to the principal offence while 37 were found guilty at trial. An equal number of defendants were either convicted of lesser offences or not convicted at all (47 in each category). Of the 47 non-convicted defendants, 22 were found not guilty by a jury, 23 had their charges withdrawn (either pre-trial or on the first day of trial) and two were ordered to be acquitted by the judge.

Table 3.3: Defendants' pleas and verdicts

Offence	Convicted				Not convicted			Total
	Guilty plea - principal offence(s)	Guilty verd't – principal offence(s)	Guilty plea – lesser offence(s)	Guilty verd't, - lesser offence(s)	Charges withdrawn /NEO	Jury NG verdict	Judge-ordered acquittal	
Robbery	20	9	20	3	14	14	2	82
Sn 18	6	6	12	4	5	3	0	36
Murder	0	22	2	6	4	5	0	39
Total	26	37	34	13	23	22	2	157

As with the preceding data on outcomes, we see in Table 3.3 a marked contrast between the murder and the other cases – with just two of the 39 defendants in the murder cases having pleaded guilty (both to lesser offences), while 18 out of 36 defendants in the section 18 cases pleaded guilty to the principal or a lesser offence, as did 40 out of 82 robbery defendants.

Table 3.4 details the sentences given to the 53 defendants who had joint enterprise convictions (that is, were convicted of the principal offence with others). For those convicted of murder, the mandatory life sentences involved minimum tariffs ranging from 15 to 38 years. 12 of the 53 defendants were given non-custodial penalties, all of which were for robbery offences. The range of sentences passed for each offence (with differentiation evident within as well as between cases) demonstrates that judges, when passing sentence, were seeking to distinguish between defendants' roles.

Table 3.4: Joint enterprise convictions - sentences

	Robbery	Sn 18 assault	Murder
Community Order/Youth Rehab. Order	4		
Suspended Sentence Order	8		
Custody ≤1 year	3		
Custody 1+ – 5 years	7	4	
Custody 5+ – 10 years	2	4	
Custody 10+ – 15 years			
Life 15+ – 20 year minimum			6
Life 20+ – 25 year minimum			2
Life 25+ – 30 year minimum			6
Life 30+ – 35 year minimum			5
Life 35+ minimum			1
Not sentenced	1		

Defendant and victim characteristics

In the main, and as shown in Table 3.5, the defendants in the sampled cases were male and young – with, for example, 99 of the 157, or almost two-thirds, being aged under 25. Around two-thirds of defendants where ethnicity was known were from BAME backgrounds (98 out of 151); 44% or 67 of the 151 with known ethnicity were black. The figures on ethnicity resonate with the general concerns, reported above, about the disproportionate impact of the joint enterprise doctrine on

BAME groups, and should be seen in the context of the make-up of London's general population, which is 60% white, 19% Asian and 13% black according to the 2011 census figures.²⁷ Although not available for all defendants, we recorded 14 non-British nationalities from the case files – spanning Europe (Irish, Portuguese, Polish, Romanian, Albanian, Kosovan, Russian), Africa (Algerian, Somalian, Ghanaian) and Asia (Indian, Iranian, Afghani, United Arab Emirates).

Table 3.5: Defendants

Gender	
Male	142
Female	15
Age group	
Under 18	20
18 to 24	79
25 to 35	38
Over 35	16
Adult (unspecified)	4
Ethnicity	
White	53
Black	67
Asian	22
Mixed race	8
Other	1
Not known	6

Some information on a total of 99 victims/complainants was available for 59 of the 61 cases in the sample. As shown in Table 3.6, the composition of this group was broadly similar to that of defendants in terms of gender and age. There was, however, a marked difference in terms of ethnicity: of the 76 victims/complainants for which information on ethnicity was available, 28 were white, the same number Asian and 18 black.

Table 3.6: Victims/complainants

Gender	
Male	91
Female	8
Age group	
Under 18	8
18 to 24	27
25 to 35	6
Over 35	13
Adult (unspecified)	32
Not known	13
Ethnicity	
White	28
Black	18
Asian	28
Mixed race	2
Not known	22

²⁷ http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/dcp171776_290558.pdf

Circumstances and nature of alleged offences

Due to the exploratory nature of the review and the limitations of the case data, we are unable to make an appraisal of the appropriateness of initial charging decisions or the fairness of outcomes. What we can show through our review, however, is the confused and complicated nature of these multi-defendant cases, and the difficulties of establishing a coherent account of what happened and who did what, in what was aptly described by a member of this study's Advisory Group as 'the fog of offending'. As noted in Chapter 2 of this report, it is not only the case that the prosecution may be unable to ascertain, with any precision, the roles of all the defendants in carrying out an offence – whether they acted as principals or accessories, or what kind of accessory roles they played – but that this precision is not required in order to achieve a conviction under the doctrine of joint enterprise.

The cases featured a mix of opportunistic and planned acquisitive crime, assaults and fights in the context of fraught or fractured family and other interpersonal relationships, and serious group and apparently gang-related violence. Robberies, assaults and other violence had taken place in streets, in pubs, in private homes and elsewhere, and defendants and/or victims were often under the influence of drugs and alcohol at the time. The cases included alleged offences in which not only was the specific role of each defendant difficult to establish, but also the distinction between victims and offenders was blurred. In two cases, co-defendants were also victim and offender in relation to one of the charges faced: attempted murder and section 18 assault respectively. Defendants frequently faced multiple charges relating to the same or different incidents, and not uncommonly had other charges pending; and most had previous convictions.

Defendants and victims were often personally known to each other prior to the alleged offence – for example, as friends or associates in at least 11 cases, as members of what were described as opposing gangs in five cases, and as relatives in four cases. In four cases, a victim's death followed a sustained period of physical and psychological abuse. In one of these four cases the victim was a seven-year-old girl whose mother and mother's partner were tried for murder and eventually both convicted of manslaughter. In another, the victim was a man with learning disabilities whose flat had been used by the defendants for selling drugs (see case study 3).

Among other incidents which had occurred in the context of pre-existing relationships was a fight between two brothers and their sister's boyfriend whom they accused of making a sexual comment to another sister (see case study 7); an assault arising out of a long-running feud between two traveller families; and a mass brawl which was an escalation of a previous altercation between a pub landlord and some of the pub's customers (case study 6). On the other hand, other offences appeared to be of a more random nature, with offenders and victims unknown to each other. This applied to many of the more opportunistic robberies – four cases of which, for example, involved alleged attacks on taxi drivers by their customers.

We have observed, in the preceding chapter of this report, that the doctrine of joint enterprise has often been seen by the authorities as a valuable tool for tackling gang-related violence – and indeed that this very purpose helped to shape the doctrine in recent decades. Among several cases in our sample, a gang-related feud was a central theme in the prosecution. One

such case involved the trial of five defendants (and subsequent retrial of two of them) alleged to have acted as hired killers on behalf of one gang engaged in a long-running conflict with another; two of the five were convicted of murder, with the others convicted of related offences. In another case, linked to a ‘turf war’ over control of a local drugs market, four defendants were convicted of murder following the fatal stabbing of two men. Gang rivalry was also part of the prosecution case made against 11 defendants alleged to have been involved in a fight which had started in a café and spilled out on to the street. All 11 defendants were ultimately convicted of public order offences. (Two of the 11 defendants were originally charged with section 18 assault while the others were charged with violent disorder, indicating a preparedness on the part of the CPS to differentiate between offender roles from the outset; the resulting convictions were variously for violent disorder, affray and threatening behaviour under section 4 of the Public Order Act.)

In a number of other cases, police intelligence or other information suggested defendants’ gang membership or associations, but the alleged offence was itself not described as gang-related. For example, it was noted on file that the three defendants in one murder case were ‘active gang members, fully immersed in that world of drugs and violence’.

3.2 Asserting joint enterprise liability

We now move on to look at how the doctrine of joint enterprise was applied with respect to the cases in our sample. For each of the 61 cases, we sought to classify the ways in which the prosecution sought to determine principal and/or secondary liability. In doing so, we drew upon the definitions of principal and secondary liability as presented in the 2010 *Crown Court Bench Book* and outlined in the previous chapter of this report. We therefore considered how many cases involved allegations based on each the following:

- Defendants actively participated in committing the offence as joint principals
- Defendants actively participated in committing the offence as secondary parties: henceforth ‘participate-assist’
- Defendants assisted others to commit the offence without being present (NB: none of the cases involved allegations of liability on this basis)
- Defendants encouraged others to commit the offence
- Defendants counselled or procured others to commit the offence
- Defendants joined an enterprise to commit one offence in the course of which others committed a collateral offence: parasitic accessorial liability or PAL.

Before we discuss our sampled cases in terms of the above classification, we must make three points clear:

1. In order to bring the widest range of issues into view, we are mainly focusing here on the prosecution case rather than the basis of any conviction.²⁸

²⁸ As discussed above, in 23 of the 61 cases there was a conviction of two or more offenders of the principal offence. In these 23 cases, there generally did not appear to be a major shift in how the defendants’ liability was conceived by the prosecution over the course of the judicial process.

2. The categories of joint enterprise liability are not mutually exclusive. As has been discussed in Chapter 2, the categories are intersecting and overlapping, and the prosecution is not required to determine a single basis of liability in order to achieve a conviction against any given defendant.
3. Our analysis of the sample can only provide very approximate numbers of cases falling into each category, since we did not obtain full information on each case. In some cases where it appeared to us that the prosecution left the basis of liability largely undetermined, there may in fact have been more specificity to the allegations.

The discussion of the categories of joint and secondary liability will be followed by a brief look at how the issue of ‘foresight’ emerged in the sampled cases.

Joint principals

In at least five of the sampled cases, it appeared that the prosecution proceeded on the basis that both or all of the defendants participated in the offence as ‘joint principals’. Examples of cases involving joint principals included:

A case of section 18 wounding in which both defendants were alleged to have inflicted serious wounds upon each other. These alleged offences were set in the context of wider offending committed by a group of 11 individuals; other defendants in the group were charged with offences including violent disorder and affray. The two principal offenders ultimately pleaded guilty to lesser offences of violence; the other nine offenders also offered guilty pleas to a variety of charges.

A robbery involving two defendants and two victims in which both defendants were responsible for threatening the victims with weapons and taking their possessions. Both pleaded guilty to the offence.

Participate-assist

At least ten cases proceeded on the basis that one defendant had played a distinctive role of active participant/assister. For example, there were several cases in which a secondary defendant was said to have acted as a get-away driver. Other cases involving a clear ‘participate-assist’ role included:

A case involving the robbery of a taxi driver in which one defendant was alleged to have ‘joined in’ the attack by restraining the complainant while his brother, the principal defendant, allegedly punched, threatened and stole money from the complainant. The two brothers were ultimately acquitted, while a third defendant pleaded guilty to a charge of handling stolen goods.

A murder case in which the victim was stabbed multiple times in his car, after it was surrounded by a number of cars driven by his attackers. Four defendants were convicted of murder at trial. In passing sentence the judge stated: ‘I regard [defendant 1 and defendant 2] as amongst the ringleaders with [defendant 3] not far behind.’ The fourth defendant, on the other hand, was ‘clearly a driver in a synchronised attack ... but there is no evidence that he got out of the car he was driving and therefore I do not sentence him as a stabber.’

In some cases where it was alleged that a distinct ‘participate-assist’ role had been played by one defendant, the prosecution was unable to identify which of the defendants this was:

In a case of murder, two defendants were alleged to have physically attacked the victim, while a third was said to have assisted by waiting in a nearby vehicle and facilitating the getaway. The prosecution was unable to identify which defendant had played which role, but all three were convicted of murder; in sentencing, the judge stated:

I am unable to resolve the conflicting prosecution evidence as to which one of you carried on in the [vehicle] whilst the other two pressed home the murderous attack on foot. It is unnecessary for me to do so, as each of you are equally responsible for its outcome.

Joint principals and/or participate-assist

Between half and two-thirds of the cases in the sample appear to have proceeded on the basis that the defendants may have acted together as principals or at least one defendant actively participated by assisting others, with the prosecution leaving the precise basis of liability undetermined. Examples of such cases included:

A robbery case in which two defendants approached a victim, hugged him and stole cash from his pocket. Both defendants were found guilty at trial (which one of them failed to attend).

Another robbery case in which two defendants were alleged to have robbed a pizza delivery man at knife-point. One of the assailants was alleged to have held a knife to the victim’s throat while the other demanded his phone and cash. Not guilty verdicts were recorded after the prosecution offered no evidence at court.

Encouragement

In at least a quarter of cases, it appears that the prosecution alleged that at least one defendant may have encouraged the principal to commit the offence. For example:

In a case involving a charge of section 18 assault, the principal defendant and victim became involved in an altercation outside a shop in the course of which the defendant stabbed the victim in the mouth. The second defendant was alleged to have provided encouragement both by his presence at the scene and by saying to the victim, ‘We’re going to do you.’ At trial, the principal defendant was found guilty of section 18, while the other defendant was found guilty of the lesser charge of section 20 assault: causing grievous bodily harm, without the element of intent.

In a number of cases it appeared that defendants were proceeded against on the basis that they may have assisted or encouraged or even acted as joint principals in the commission of the offence. This applied to several murder cases in the sample – for example:

Three defendants were accused of murdering one of their associates – a vulnerable man with whom they regularly went drinking and had assaulted on many occasions in the past.

It appears that all were prosecuted on the basis that they were either joint principals or that one or more had assisted or encouraged the other(s) to commit the murder. Two of the defendants were subsequently convicted at trial of murder. The sentencing judge commented:

By the jury's verdicts ... each of you either took part actively in kicking or stamping on [the victim], or at the very least, took part in the attack upon him, physically or by encouragement, realising there was a serious risk that the other would kick or stamp on him with intent to do him really serious injury. It was a classic joint enterprise.

The difficulty of determining whether presence at the scene should be deemed 'encouragement' – which has been a key issue in some of the most controversial joint enterprise cases to which campaigners have drawn attention in recent years – was highlighted by the following robbery case:

The secondary defendant was prosecuted on the basis that she had encouraged the principal to commit an offence of robbery. The case proceeded to trial; however at the end of the prosecution case the judge directed the jury to acquit the secondary defendant because:

The mere fact that someone stands by and does nothing cannot of itself be encouragement, there must be something in the nature of actual encouragement, and it seems to me that there's no evidence in this case that [the defendant] did encourage.²⁹ (See case study 1)

Counselling or procurement

In three cases it was alleged that one of the defendants had counselled or procured others to commit the offence:

Three defendants faced charges of section 18 assault resulting from their involvement in a fight at a pub in which several victims had been injured. One of the defendants was said to have been specifically 'recruited' by another (who himself was also present at the scene) to get involved in the fight (see case study 6).

A murder case was borne out of rivalry between two gangs. A 'gang elder' was alleged to have 'ordered' the shooting of a member of an opposing gang; the victim had, in fact, been wrongly identified and was not a gang member. Evidential problems led to the prosecution offering no evidence when the case went to court, and all defendants were acquitted.

Parasitic accessorial liability

PAL appeared to be a dimension of three cases in our sample. Given that PAL has been most commonly associated with murder prosecutions (certainly, discussions and criticisms of PAL have generally focused on its application to murder prosecutions, and it originally emerged in this context), it is no surprise that all three of these cases involved murder. In each of these cases, other bases of secondary liability were also under consideration. The small number of (potential)

²⁹ The CPS joint enterprise guidance emphasises that in order to be considered 'encouragement', a secondary defendant's presence at the scene of an offence must be 'voluntary and purposeful'.

PAL cases within our sample might suggest that there was growing caution on the part of the CPS about this form of liability, although without a larger sample and in the absence of comparative data from an earlier time period it is not possible to reach any firm conclusions about this.

One murder (case study 4) involved the fatal stabbing of a robbery victim. Four defendants were said to have been in a car when they spotted the victim and decided to rob him. Three of them approached the victim, and one of them stabbed him. All four defendants (along with a fifth who had been involved in an earlier joint offence of conspiracy to burgle) were charged with murder; two of them – the stabber and one other – were convicted.

In another murder case (case study 2), it was alleged that the victim was shot by a member of a rival drug gang as retaliation for an earlier attack upon one of their members. The individual who was believed to have fired the shots was arrested but – because of evidential problems – not charged; the three defendants who were charged with the murder were alleged to have played contrasting roles and were variously prosecuted on the basis of participate-assist and/or PAL. Two of the three were found guilty at trial of murder, and the third found guilty of conspiracy to commit robbery.

Foresight

In seven of the sampled cases we were able to identify a direct or indirect reference to foresight by the prosecution or by the judge in summing up. There was only one case in which the word ‘foresight’ was explicitly used; all of the other cases involved less explicit references, such as the phrase ‘intended or realised’ or ‘realised there was a real risk’.

As might be expected, foresight was an element in each of the three murder cases that we have identified as involving, or possibly involving, PAL:

In one of the potential PAL cases (see case study 5), the murder was committed following an altercation between the victim and the three defendants. One of the defendants had stabbed the victim while the other two had kicked and hit him. In summing up, the judge informed the jury that the two secondary parties could only be convicted of murder if jurors were sure that they had known that the principal was armed with a knife when the assault began and ‘intended ... or ... foresaw’ that it might be used to cause, at least, really serious harm to the victim: ‘It is therefore a mental element that requires either personal intent or foresight’, explained the judge.

In the other two PAL cases, foresight was alluded to in similar terms, albeit the word itself was not used:

The CPS, in coming to a decision about charging the get-away driver in the case of the murder of the robbery victim (case study 4), referred to the likelihood that this individual would have been ‘aware’ of the presence of a knife, indicating that he ‘would be realising that one of the group might use force of the kind that was actually used, with intent to kill or to cause really serious harm.’ The judge, in summing up, directed the jury that:

*The prosecution do not have to show that the defendant intended or desired that outcome [of death or serious harm] but they must make you sure that D **recognised it as a real possibility** and went ahead despite this (emphasis added).*

Among the non-PAL cases in which there was reference to foresight were the following:

In a murder case, the principal defendant was alleged to have stabbed and killed the victim outside a shop. The secondary defendant was said to have accompanied the principal to the scene and to have been in contact in the immediate aftermath. The CPS noted, with respect to its charging decision, that ‘there is not a lot of evidence that shows [the secondary defendant’s] involvement in the offence but it is clear **he would have been aware** of what [the principal] was going there to do’ (emphasis added). Both defendants were charged with murder, to which the principal was found guilty, while the secondary defendant’s plea of guilty to perverting the course of justice was accepted.

In the case mentioned above in which a defendant was alleged to have procured another to ‘commit violence’ in the context of a pub fight (see case study 6), the judge directed the jury to consider what the defendant had ‘intended or realised there was a real possibility’ his co-defendant would do.

3.3 Terminology of joint enterprise

Across all the cases in our sample, we sought to document precisely if and how the term ‘joint enterprise’, and related phrases such as ‘joint plan’ or ‘common purpose’, appeared in the documentation we obtained. (Since the amount of documentation we obtained varied between cases, we make no claim that our record of the use of terminology is comprehensive.)

For a majority of the cases in our sample (37 out of 61) we noted usage of the specific term ‘joint enterprise’ in the available documentation. The term was deployed by the police, CPS, prosecution counsel and judges in both summing up and sentencing remarks. In a further nine cases, we found similar terms used such as ‘joint venture’, ‘joint plan’, ‘common plan’, ‘common purpose’, ‘group enterprise’ or simply the use of the phrase ‘joint’ followed by the specific offence – as in ‘joint robbery’. Very predominantly, the term ‘joint enterprise’ was used in the broad sense that we have used it throughout this report, and reflecting the CPS guidance: that is, to refer to cases in which two or more defendants are charged with the same offence, whether as joint principals or as principal and secondary parties.

Police

We noted some brief references to 'joint enterprise' in case papers completed by the police; for example:

This was a joint enterprise. (attempted robbery)

Joint enterprise legislation [sic] covered [in police interview] and again [the suspect] remained silent. (murder)

There were also some instances of more detailed consideration of the joint enterprise doctrine by the police. For example, in one murder case (case study 3) the police noted that the defendants

all leave together, in concert, giving a clear indication that they are acting as a collective group. ... It is not possible, and may never be possible, to prove exactly what happened. ... [Defendant] has to stand trial with the others on a joint enterprise basis.

Prosecution

References to joint enterprise in prosecutors' notes on charging decisions or case reviews ranged from brief references – such as 'this case will proceed against both defendants as a joint enterprise' – to discussions at varying levels of detail about the basis upon which the prosecution would proceed in relation to joint enterprise. In some cases, joint enterprise was discussed in general terms, such as: 'clearly a case of joint enterprise; from the complainant's description they were all acting together in the attack upon the complainant'. In a small number of cases, prosecutors had made a note that the specific role of each defendant could not be established, but that the prosecution could proceed on a joint enterprise basis:

Both accost [the complainant] and force him to the ground; it cannot be [said] which one actually took the money but joint enterprise for robbery.

Sometimes, the prosecutors noted the basis on which prosecution would proceed 'at this stage', highlighting the probability that greater clarity about defendants' roles would emerge as the case progressed. In other instances, prosecutors had more certainty from the outset about the respective role of each party. For example:

[The witness] provides clear and unequivocal evidence that [defendant 1] fired the shots. The case against [defendants 2 and 3] will be put on a joint enterprise basis. The former ordered the shooting ... The latter [was] with [defendant 1] and encouraged him to open fire. (murder)

At this stage I am minded to charge [defendant 2] on a joint enterprise basis. Although he did not take the watch and the bag or fire the gun, he was the get-away driver and therefore he is jointly responsible for the commission of the offences. (robbery)

In one case it was recorded that the prosecutor referred specifically to the CPS guidance on joint enterprise. This was the case of murder, referred to above, in which the second defendant was alleged to have accompanied the first to the scene and to have been in contact with him in the

immediate aftermath. Noting the weaknesses of the case in relation to secondary party, the prosecutor commented on the charging form:

I have considered the guidance on joint enterprise. One of the types of joint enterprise is where D assists or encourages P to commit a single crime and an example of this is D assists or encourages by driving P to the scene and acting as lookout knowing that P is going to commit the offence. On this basis I am satisfied that it is appropriate to apply the threshold test and advise that both suspects are charged with one offence of joint murder.

This was one of several cases in which prosecutors specifically noted the weaknesses of a joint enterprise case when coming to a decision on charge: see also case study 7, for example.

Judiciary

We obtained transcripts of the trial judge's summing in 12 of the cases in the sample; a direction on the law relating to joint enterprise was provided to the jury in each of these cases. In 11 out of the 12, the specific term 'joint enterprise' was used in the directions; in the 12th, the judge directed the jury about cases involving a 'common shared purpose' between defendants. Some judges began their directions on joint enterprise with a general explanation of the term – for example:

When two or more people act together with a common purpose to commit an offence, they are said to be a party to that offence or part of a joint enterprise. In ordinary language they are in it together. (murder)

So let me turn to joint enterprise as it's often called. This applies where you've got two defendants charged on the same count where the prosecution are saying they are acting together (section 18)

Interestingly, in one murder case (case study 5) a jury had themselves raised a question about joint enterprise prior to the judge's summing up – indicating a general awareness of the issue. When summing up, the judge commented:

Remember, members of the jury, long ago your question, asking whether the concept of a joint enterprise was engaged in this case; well, it certainly is and your question, if I may say so, was prescient. Here, I give you assistance in your approach to that task.

Across the 12 summing up transcripts we obtained, there was consistency in the ways in which joint enterprise was described to the jury. For example, judges in several of the cases used the example of a hypothetical bank robbery, which tended to involve variants of the following scenario:

A classic example is a bank robbery: A, B and C agree to rob a bank. A provides the plans and acts as a lookout, standing outside the bank with his mobile phone. It is B's job to go into the bank with a mask and a gun, hold up the cashier and actually physically steal the money. C is given the role of getaway driver and is waiting outside the bank. C does no

violence. C does not actually take anything at that point. A is standing outside keeping lookout, he is not involved in the violence either, but they are all guilty of robbery because they are all participating in the commission of the same offence.

Having provided some kind of general explanation of the concept of joint enterprise, judges generally moved on to how the concept applied to the specifics of the case. The complexity of the direction and any subsequent 'route to verdict' was dependent upon the complexity of the case itself. Accordingly, directions and routes to verdict could encompass just two or three considerations or many. For example, in one robbery case, the jury were given two steps by which they were required to determine the guilt of a defendant: first, they had to be sure that a robbery had taken place; if so, they had to be sure that the defendant 'was acting as part of a joint enterprise with the other, participating in that robbery'.

On the other hand, in a murder case (case study 3), the jury were told to consider 11 conditions with respect to each defendant. The first three conditions had to be satisfied if the defendant was to be found guilty of murder as a principal. The next four conditions had to be satisfied if the defendant was not guilty as a principal but guilty as a secondary party. (Of course, if the jury decided the defendant was guilty of murder, there would be no way of knowing if this was on the grounds of his being a principal or secondary party.) The final set of four conditions has to be satisfied if the defendant was not guilty of murder, but guilty of manslaughter. The final condition for a finding of guilt on the manslaughter charge was in itself complex: jurors had to be sure that the defendant

realised that at least one of those armed with a knife might assault [the victim] with a knife in the course of the joint plan, as a result of which he might suffer some bodily injury, but you consider that the defendant did not realise or may not have realised that such assault would be carried out with intent to kill [the victim] or cause him really serious bodily injury.

We obtained transcripts of the judge's sentencing remarks for 14 cases in which two or more defendants were convicted of the principal offence of robbery, section 18 assault or murder. The specific term 'joint enterprise' was used by the judge in the sentencing remarks for five of these cases, in three of which the case was described as 'a classic joint enterprise'. For example, in a case in which four defendants were being sentenced for a murder by multiple stabbing, the judge noted with respect to one defendant's claim that he had not himself stabbed the victim:

I do not know whether that is true, but if it is true it would be entirely consistent with the leader taking an organisational role and leaving it to underdogs to do the actual dirty work under his overall control. Either way it seems to me to make no difference in what is a classic joint enterprise.

4. Promoting clarity and transparency

Joint enterprise is an aspect of the criminal law of England and Wales that is complicated, confusing, and subject to multiple and often conflicting interpretations. It is used in the prosecution of criminal cases that – by virtue of the fact that they involve multiple defendants, and include the most serious and violent of offences – tend themselves to be complicated and confusing, and sometimes revolve around highly distressing and even tragic events. Often, the stakes for all involved in these cases could hardly be higher: defendants may be facing immensely long prison sentences, and victims’ family members may be seeking justice in the wake of incidents that have had devastating effects on their lives. One of the major factors shaping the evolution and application of the law on joint enterprise in recent decades has been the desire on the part of the authorities to deter youth and gang-related violence. Whether the law has achieved this is very much open to question; certainly, the doctrine of joint enterprise has provoked huge mistrust and anger among many who have directly felt its effects.

Our review of a sample of CPS case files has revealed something of the enormously wide range of scenarios which the law on joint enterprise must deal with, and the convoluted networks of social relationships within which much group offending or alleged group offending occurs. As illustrated by the preceding discussion of the many different and intersecting ways in which principal and secondary liability are conceived, and by the detailed case studies in Chapter 5, the prosecution of these cases poses some great challenges and can be a slow, difficult and somewhat haphazard process, shaped by many factors that go beyond what might seem to be the essential ‘facts’ of the case.

4.1 Looking ahead

Joint enterprise has been the subject of intense debate and controversy in recent years. The focus of much of the controversy has been the evolution of the concept of ‘parasitic accessory liability’ (PAL) and the treatment of a defendant’s ‘foresight’ of an associate’s criminal act as equating to his or her ‘intention’ with respect to that act.

The Supreme Court in *Jogee and Ruddock* concluded that the creation of the form of secondary liability which became known as PAL was a fundamental ‘error’. It is to be hoped that this ruling will substantially reduce the potential for miscarriages of justice and perceived ‘drag-net’ prosecutions under the joint enterprise doctrine. It is also welcome that the judgment pointed to the problematic way in which the courts had allowed policy imperatives to shape the development of the law, as evident most starkly in Lord Hutton’s contention that practical and policy considerations should ‘prevail over considerations of strict logic’.

However, we do not yet know the full implications of *Jogee and Ruddock*. At the time of writing, it is unknown how many appeals are likely to be heard in the wake of the Supreme Court ruling, but it is possible that some individuals who were previously sentenced under the joint enterprise doctrine, and may hope that the judgment offers the opportunity for appeal, will

be left disappointed. As noted above, the Supreme Court has sought to downplay the potential for appeals, insisting that its ruling does not imply that prior convictions were ‘substantially unjust’.

Separately to this question of ‘substantial injustice’, it appears that the *Jogee and Ruddock* judgment is directly relevant only to that sub-set of joint enterprise cases that turn on PAL and/or foresight. This study’s review of an – admittedly small – sample of case files suggests that such cases are likely to make up only a fraction of all joint enterprise cases, if joint enterprise is defined in broad terms as the doctrine permitting multiple defendants to be convicted of the same offence regardless of their level or type of involvement in its commission. And yet, notwithstanding this relatively limited reach of the Supreme Court ruling, some of the press coverage of the ruling is likely to have fed public fears about violent crime, by conveying the sense that it would necessarily result in many convicted and alleged murderers being ‘set free’.³⁰

The need for clarity and transparency

To whatever extent the Supreme Court judgment in *Jogee and Ruddock* serves to ‘correct’ certain problems in the development and application of the law on joint enterprise, the damage that has been done to the legitimacy of the courts system and judiciary as a consequence of these problems is likely to be substantial. Recovery from the deficit in legitimacy will doubtless take time.

Meanwhile, it is likely that constructive debate on the subject will be hampered by continuing misperceptions and misunderstandings of this difficult aspect of the criminal law - including among those who may have unrealistic hopes that the changes to the law will improve their situation as convicted offenders, and those who may have unrealistic fears that the changes will result in offenders escaping justice. Even if the Supreme Court judgment goes some way towards simplifying the law on joint enterprise, questions of how and why principal and accessorial liability are ascribed in serious cases remain complex in terms of both legal doctrine and practical effect. As things stand, furthermore, there are no provisions for routine recording and monitoring of cases involving forms of joint enterprise, and hence systematic information on the application of the doctrine is almost entirely lacking.

There is an urgent need for the existing information gap to be addressed, and for greater clarity and transparency in the prosecution of joint enterprise cases. It is also evident that, following the significant correction that has been made to the law on accessorial liability, there is both more urgency and more opportunity associated with the task of making the prosecution rationale clearer and more transparent. Success in this task will increase the chances that individuals directly involved in multi-defendant cases – whether as defendants, complainants,

³⁰ See, for example, <http://www.dailymail.co.uk/news/article-3452576/Hundreds-convicted-criminals-including-murderers-appeal-sentences-High-Court-ruled-law-joint-enterprise-wrongly-interpreted-judges-30-years.html>; <http://www.telegraph.co.uk/news/uknews/law-and-order/12186217/Joint-enterprise-First-murder-case-defendants-walk-free-after-landmark-ruling.html>; <http://www.express.co.uk/news/uk/645236/Joint-enterprise-murder-Supreme-Court-wrongly-interpreted-judges-gang-members-killers>

witnesses, or bereaved family members of victims – will understand the prosecution case against the defendant and, potentially at least, will view the process as legitimate. The wider public, too, would thereby gain greater understanding of how multi-defendant cases are being dealt with and their outcomes. Clarity and transparency are also of critical importance to criminal justice practitioners, who can only apply the law in a fair and consistent manner if they have a precise and shared understanding of it and knowledge of how it is working on a day-to-day basis: not only in terms of their own practice but also the practice of others.

Below, we present a series of recommendations, aimed at policy-makers and practitioners engaged in all aspects of the judicial process, for enhancing clarity and transparency in the prosecution of joint enterprise cases. First, however, it is important to note that there are limitations as to how much clarity can be achieved with respect to individual cases. Over the course of this report, we have highlighted the fact that in many cases where there is alleged offending by more than one individual, it is not possible for the precise role of each individual to be established (perhaps even by the defendants themselves). In such circumstances, if there is sufficient evidence that all were involved in the offence as principals and/or accessories, it is lawful for all to be convicted. Achieving transparency here would mean, in line with the recommendations to follow, identifying and recording the alternative bases of liability for each defendant and reflecting this in the sentencing remarks. Accordingly, while precision about liability is not always a realistic aim, transparency – including, where applicable, transparency about unavoidable **lack of** precision – should always be an aim.

4.2 Recommendations for enhancing clarity and transparency

Charging decisions and recording

1. The CPS should ensure that, in all cases in which more than one defendant is charged with the same offence in relation to the same incident(s), the alleged basis of liability is identified and recorded on file. This should entail routine notification, as part of completion of the charging decision form, of the following information with respect to each defendant:
 - a) Whether the defendant is charged as a principal, accessory or as either a principal or accessory
 - b) If charged as a (possible) accessory, the basis of this – for example:
 - Having participated in the offence to assist its commission
 - Having assisted the commission of the offence without being present
 - Having encouraged the commission of the offence
 - Having counselled or procured the offence
 - A combination of any of the above
2. The recording of alleged principal and/or accessorial liability should be updated where charges are amended during the prosecution process and at the verdict.

3. The Ministry of Justice or HM CPS Inspectorate should undertake a review to support the trialling and development of the new charging and recording process outlined above, and to monitor prosecutions following the introduction of the system. The findings of this review should, further, help to determine whether there is a need for legislative change, alongside the evolution of case law, to promote more consistent and proportionate approaches to prosecuting multi-defendant cases.

Communications

4. As part of current development of the Common Platform for digital management of case information across the criminal justice system, provision should be made for collation and publication of national figures on:
 - Cases in which two or more defendants were convicted of the same offence in relation to the same incident, by offence category and CPS area
 - Defendants so convicted, by offence category and CPS area.
5. Better identification and recording of the basis of (principal and/or accessorial) liability as alleged against each defendant in multi-defendant cases should help to ensure that practitioners fulfil their existing obligations to keep defendants and complainants, and others involved in the case, fully informed about charges and any forthcoming trial. Responsibility for this communication with complainants falls to the police (the officer in the case) and/or the Witness Care Unit, and the CPS prosecutor with respect to family members of homicide victims. The defence barrister or solicitor has the duty to explain to their client the precise nature of the charges faced.
6. The Sentencing Council should issue guidance to judges on appropriate ways to cover issues of principal and accessorial liability in their delivery of sentencing remarks, with a view to ensuring that defendants, victims and all others concerned in a case (including any reporters covering it) have a clear understanding of the basis on which each individual has been convicted.
7. In recent years, the term 'joint enterprise' was subject to differing definitions and, because of the surrounding controversies, became increasingly toxic. With its observation that 'joint enterprise' is 'not a legal term of art', and by limiting joint liability to scenarios in which defendants either are joint principals or one aided, abetted, counselled or procured another, the *Jogee and Ruddock* ruling takes a large step away from the older terminology. We recommend that the courts, CPS and other bodies should follow this lead in avoiding use of the term 'joint enterprise' in future. Relevant bodies should give consideration to the development of an alternative terminology which will aid rather than inhibit clear communication about multi-defendant cases.

Sentencing

8. The Sentencing Council should give consideration to the provision of guidance on the principles to be followed in the sentencing of multiple offenders whose specific roles with respect to the offence or offences are not known.
9. Where a defendant is convicted for murder as an accessory and is substantially less culpable than the principal, the judge has limited capacity to reflect this at sentencing because of the mandatory life sentence for murder. As has been urged in the past by the Law Commission among many others, we recommend that the government should review the mandatory life sentence for murder.

5. Case studies

Eight case studies drawn from our joint enterprise sample are set out below. These encompass the three main offence types of robbery, section 18 assault and murder; and a range of outcomes including guilty verdicts, jury acquittals, and pleas to lesser offences. The cases involve a variety of conceptions of principal and secondary liability, and include some of the most complex and serious of our sample; they therefore illustrate many of the particular challenges associated with the prosecution of multiple defendants.

Case study 1: Robbery and alleged encouragement

Allegations

D1 (a man) and D2 (a woman) were in a relationship. D1 suspected that D2 was ‘seeing’ the complainant (V), and had argued about this by telephone. One evening, D1 and D2 went to V’s flat. V heard a knock at the door and saw D2, who appeared to be on her own. However, when V opened the door, D1 pushed his way in, threatened V with a baseball bat and slapped him around the face. D1 made some phone calls and several other men arrived at the scene. D1 demanded the logbook for V’s motorbike, which V gave him after initially refusing, along with the motorbike keys. D1 repeatedly threatened V with the bat and then left the flat with the other men, taking with him several items including a laptop and camera, but not the bike.

Prosecution

D1 and D2 were both charged with robbery and pleaded not guilty; the other men were not charged. D2 was prosecuted on the basis that she had ‘encouraged’ D2 to commit the offence. However, the weaknesses of the case against her, specifically in relation to joint enterprise, were noted in the prosecutor’s instructions:

The joint enterprise against D2 is not particularly strong but she is alleged to have told V to ‘get the logbook’ for his motorbike when he refused to get it for D1. On V’s account, D2 has appeared at the door whilst D1 has hidden out of sight. ... I can foresee a time when we may get a defence statement from her indicating that she thought they were going round to have a conversation but did not expect D1 to go on to threaten V/call others over and take items or that she was taken there under duress. At present, however, she has not raised this.

The trial took place around fourteen months after the alleged offence.

Judge’s direction to acquit

On the second day of D1 and D2’s trial, at the end of the prosecution case, the judge directed the jury to acquit D2. This was because, in his view, there was not sufficient evidence that D2 had participated in the robbery by way of encouragement: her mere presence at the scene was not sufficient to prove that she ‘had the requisite intention and that secondly she participated’.

Outcome

The trial proceeded against D1, who was acquitted by the jury.

Case study 2: Murder arising from gang feud

Allegations

This case involved the murder of a 15-year-old boy who was involved in selling drugs from a flat. It was alleged that he was shot by members of a rival drugs gang in retaliation for an earlier attack upon one of their members. D1 was said to have organised the attack and to have travelled to the property with others, including D2, in a vehicle hired and driven by D3. D2 was said to have been recruited for the specific purpose of gaining access to the property, with D3 recruited to drive the group to and from the scene. Once at the scene, D1 and D2, with one other man, entered the property, whereupon D2 held the victim as he was shot by one of the other two men. D3 remained in the car.

Prosecution

It took several years from the commission of the offence for charges to be brought against the three defendants. All three were charged with murder, conspiracy to rob and possession of a firearm with intent. They pleaded not guilty to each of the charges. Two other suspects who were alleged to have been present at the scene were not proceeded against.

Directions to the jury

In summing up, the judge directed the jury that in order for each defendant to be convicted of murder:

- 1 The defendant must have been party to a joint plan to carry out a 'revenge attack' against the occupants of the premises targeted;
- 2 At the time of the attack, he must have either been in possession of or have 'known or believed' that at least one of his group was in possession of a weapon capable of causing fatal injury;
- 3 He must have either intended to kill or to cause really serious harm to one of the occupants of the property or 'realised ... that that there was a real risk that a firearm or weapon capable of causing fatal injury might be used to kill or cause really serious harm';
- 4 He must have taken part 'deliberately';
- 5 The act that caused the victim's death must have been 'within the scope of the joint plan'.

Outcome

D1 and D2 were found guilty on all three counts; each was given a sentence of imprisonment for life with a minimum tariff of 35 years. D3 was found guilty of conspiracy to rob only and sentenced to 5 years' custody. In sentencing, the judge described the shooting, and said: 'Within minutes, V lay dead - shot not by you, D1, nor by D2, or by D3, but, in all probability, by [another].'

Case study 3: Murder of a vulnerable adult

Allegations

The three defendants, all in their mid to late teens, had been selling drugs from the flat of a man with learning disabilities (V). V's mother had recently informed the local authority of her worries about the drug dealing and V's vulnerability, but no action had been taken. One evening an argument flared between the defendants and V, during which V was stabbed and killed.

Prosecution

The three defendants were arrested and charged with murder within days of V's death. Each defendant admitted to being present in the flat at the time of the killing but claimed that the others were responsible for inflicting the stab wounds. In making the decision to charge the defendants, the prosecutor stated:

Whoever actually struck the blows the fact is that all three were present, and from all the surrounding supporting evidence, all three were active and participating in the victimisation and attack on the victim.

The trial began around five months after the offence was committed. An excerpt from the prosecution's opening note reads as follows:

The issues for the jury will be: which of the defendants stabbed the victim and caused his death because that defendant is obviously guilty of murder ... and whether any defendant who did not inflict the fatal stab wound is also guilty of murder because by his conduct he aided and abetted the defendant who did inflict the fatal stab wound (i.e. was a party to a joint enterprise).

An alternative verdict of manslaughter was offered to the jury with respect to each defendant.

Outcome

All three defendants were found guilty of murder. In sentencing, the judge referred to the fact that each defendant had gone to the flat armed with a knife, and stated: 'I cannot be sure which knife caused the fatal wound but that does not matter as they all inflicted wounds.' He also commented that 'Having regard to the number of the wounds, I would have been satisfied that they were all done by the same person.'

Two of the defendants, who were aged under 18, were detained at Her Majesty's pleasure for a minimum of 17 years and 16 years respectively. The third, slightly older defendant was given a life sentence with a minimum tariff of 17 years.

Case study 4: Murder in the course of a robbery

Allegations

Five defendants had originally conspired to break into a warehouse to steal computer equipment. Four of them (Ds1-4) drove to the warehouse; the fifth (D5) had played a part in the conspiracy by recruiting the get-away driver (D1). However, the burglary did not proceed as planned and the defendants left the scene. While driving back, they spotted a man carrying a laptop and formulated a plan to rob him. D1 remained in the car while D2, D3 and D4 approached the victim. In the course of the robbery D2 stabbed and killed the victim. D2, D3 and D4 returned to the vehicle and were driven away by D1.

Prosecution

Initially all five defendants were charged with murder; however the prosecution later dropped the murder charge against D5 and accepted a plea to conspiracy to burgle. D2 was prosecuted as a principal defendant as he admitted to causing the fatal stab wound - albeit, he claimed, in self-defence. D1, D3 and D4 were prosecuted on the basis that they had assisted or encouraged D2 in committing the murder or had formed a joint plan to rob the victim, in the course of which D2 had killed the victim.

Directions to the jury

In summing up, the judge provided the jury with a joint enterprise direction. This stated that each of D1, D3 and D4 could be convicted of murder only if he had known that one of the group was armed with a knife and, on participating in the robbery, had

recognised the real risk [that] one of his co-defendants might use the knife to stab with the intention of killing or causing really serious bodily harm, and, that he went ahead playing his part in the robbery in that knowledge.

Outcome

The jury found D2 and D3 guilty of murder, as well as guilty of robbery and conspiracy to burgle; each received a life sentence with a minimum tariff of 30 years. In sentencing them, the judge commented that the murder had resulted from 'an attack by at least two of you, on the jury's verdicts' and that 'you two men acted in concert'.

D1 and D4 were found not guilty of murder and robbery but guilty of conspiracy to burgle; they both received custodial sentences of 32 months, respectively. D5 – who had previously pleaded guilty to conspiracy to burgle – received 20 months' custody.

Case study 5: A fight and murder

Allegations

Two defendants, D1 and D2, were said to have met the victim (V), with whom they were loosely acquainted, by chance in the street. They got into an argument, in the course of which D2 tripped and kicked V. D1 and D2 got into a nearby car, in which D3 and another man were sitting. V approached the car and threw acid through the car window. D1, D2 and D3 got out of the car and chased V. D1 reached him first and stabbed him several times; D2 and D3 kicked him. The defendants fled the scene and the victim later died in hospital.

Prosecution

The three defendants were charged with murder. The prosecutor, in notes on the charging decision, observed that 'It is to be anticipated that D2 and D3 may raise the issue that they did not know that D1 had a knife'. Instructions to the prosecution advocate pointed out that: 'As regards joint enterprise, the witnesses and CCTV provide evidence of an attack in which all three took part'. In his opening address, the advocate told the jury:

The circumstances of this attack and the actions of these defendants are such that you will arrive at the sure conclusion that each of them knew what was going to happen, participated in it and that they intended to kill [the victim], or at the very least cause really serious harm.

Directions to the jury

In summing up, the judge explained to the jury that D1 was alleged to be the principal defendant because he accepted that he had inflicted the fatal knife wounds and that D2 and D3 were thus 'said to be secondary parties in this alleged joint enterprise murder'. In order to convict D2 and D3, the judge explained, the jury had to be sure that these defendants had shared the unlawful intention to cause, at least, really serious bodily harm or that they had 'fores[een] the risk of such harm and took some active part so as to achieve that contemplated aim'. Further, the judge directed that D2 and D3 could be guilty of murder only if they had known that D1 was armed with a knife before the assault on the victim began.

Outcome

D1 was convicted of murder by the jury and received a life sentence with a minimum tariff of 15 years; D2 and D3 were both acquitted of murder and of the alternative charge of manslaughter.

Case study 6: Section 18 assault during a pub brawl

Allegations

Over the course of a few days, two of the defendants, D1 and D3, had had a number of altercations with the landlord and some other customers in their local pub. During the latest such incident, D1 threatened the landlord that he would return to the pub with one of Britain's 'most wanted'. A few hours later, D1 and D3 did indeed return with another man who had a reputation in the area for serious violence – D2. A fight soon broke out, which then spilled out from the pub on to the street. In the course of the fight, one customer was seriously injured having been hit over the head by D2 with a chair; the landlord and two other customers were also injured in the fight, as were D1 and D2.

Prosecution

D1 and D2 were both charged with section 18 assault in relation to the customer who had been hit with the chair; they were also charged with Section 20 assault and affray, as alternative counts. D2 was proceeded against as the principal and D1 was prosecuted on the basis that he had 'recruited' D2 to commit violence. D3 faced section 18 charges in relation to injuries he had caused to other victims, and was also charged with possession of an offensive weapon. All three defendants pleaded not guilty and the case went to trial. In his opening address, prosecution counsel stated that at the point at which D2 hit the victim with a chair, he and D1 had been 'acting together in joint enterprise with the common intention to cause [the victim] really serious bodily harm'.

Directions to the jury

On the grounds that D1 was being prosecuted as a secondary party who had 'recruited' D2, the jury were directed that they should consider the case against D2 before considering D1. They were told that 'the question of joint criminal liability of D1 only arises if D2 is guilty of one of the [three] offences charged'. A guilty verdict on the section 18 count for D2 would then leave it open to the jury to find D1 guilty of either section 18 or the lesser charges of section 20 or affray, depending on their view of what D1 had 'intended or realised there was a real possibility' D2 would do. If D2 was found not guilty of section 18 but guilty of section 20, the jury would have the options for convicting D1 of section 20 or affray – and so on.

Outcome

D1 and D2 were both found guilty of section 18. In sentencing D1, the judge stated:

You are equally guilty of that offence on the verdict of the jury on the obvious inference from evidence that you had recruited [D2] by telephone to commit violence on the occupants of the public house following the earlier dispute.

D1 received a custodial sentence of three years and D2 a custodial sentence of five years. D3 was found guilty (after a retrial) on all the counts he faced and was sentenced to 14 years' custody.

Case study 7: Allegation of a section 18 assault during a family dispute

Allegations

The offence arose in the context of a family argument about an incident said to have occurred many years before. The victim (V) was a young man who was at home with his girlfriend and her daughter when they were visited by the girlfriend's two brothers (D1 and D2) and sister (D3). It was alleged that after D3 left the house with the child, D1 and D2 accused V of having asked another sister 'for a blow job' when she was four years old. The discussion degenerated into a physical fight in the course of which D1 and D2 punched V and D1 also hit him in the head with a bottle, while V's girlfriend attempted to shield him from her brothers.

Prosecution

D1, D2 and D3 were all originally charged with section 18 assault; D3 was included on the basis that she had helped to plan and arrange the offence. In the record of the decision to charge, the CPS noted that the case against D3 was 'tenuous', but that 'on balance I feel the circumstantial evidence is there to show that she aided and abetted her brothers to carry out the act'. Subsequently the case against D3 was dropped, with the CPS stating that:

... there is insufficient evidence to attribute the joint enterprise to D3. She leaves the flat with the young girl before the discussion about V's behaviour even begins. Given the content of the conversation, it would likely be suggested by defence that she was simply shielding the girl from an inappropriate conversation. While she clearly had knowledge that a confrontation was to take place, I'm not satisfied that we could prove she knew and intended that her brothers would commit wounding.

The case against D1 and D2 proceeded to trial, with the charges amended from section 18 to attempted section 18, and the prosecution stating that 'the indictment... is put on a joint enterprise basis that both brothers acted together in attacking V with a glass bottle, striking him to the head'. In their defence, D1 and D2 stated that they had acted to protect their sister after V had pulled out a knife.

Directions to the jury

In summing up, the judge explained to the jury that 'the essence of joint responsibility for a criminal offence is that each defendant shared the intention to commit the offence and took some part in it however great or small so as to achieve that aim'. With respect to the case against D2, the jury were told:

If you are sure that there was a plan of the sort alleged by the Crown whereby his brother would use a bottle to injure V, with the intention of causing him serious bodily harm, then D2 would be guilty. However, if you think that he was not, or may not have been party to such a plan, or that he did not or may not have intended that serious bodily injury would result, you must find him not guilty.

Outcome

The jury found both defendants not guilty.

Case study 8: Alleged robbery or theft

Allegations

This case involved an alleged street robbery by a man (D1) and a woman (D2) who were friends and in their 30s, of an older man (in his 50s) who was an acquaintance of both defendants. All three had previously lived in a hostel together. The victim, who had been seen by D1 and D2 using a cashpoint, was robbed of his wallet containing £10, and was pushed to the floor and kicked during the incident. The victim was considered vulnerable by the prosecution as he had a serious alcohol problem and was of no fixed abode at the time of the offence.

Prosecution

The defendants were charged with robbery and were deemed to have both actively participated in the offence. Both pleaded not guilty and the case proceeded to trial. However, the victim did not appear in court to give evidence, and the Crown were unable to contact him.

The case was adjourned until the next day, and then adjourned a second time following legal argument about the available CCTV evidence. On the third day, two lesser charges were added to the indictment: theft (in relation to D1 and D2) and common assault (for D1 only). The defendants pleaded guilty to these lesser charges and the robbery count was allowed to lie on file.

Outcome

Both defendants were sentenced to four months in custody for the theft, and D1 was sentenced to a short concurrent term for the common assault.

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Glossary

Criminal liability	Legal responsibility for a criminal act. It is usually dependent on two elements: a conduct element (the actus reus or 'guilty act') and a mental element (the mens rea or 'guilty mind').
Crown Prosecution Service (CPS)	The principal prosecuting authority for England and Wales. The CPS makes the charging decision in serious cases; prepares the prosecution case; presents the case at court (through an in-house advocate, self-employed advocate or agent).
General accessorial liability (also known as traditional secondary liability or basic accessorial liability)	A form of joint enterprise liability whereby any person who aids, abets, counsels or procures the commission of any indictable offence, is liable to be tried and punished as a principal offender (Section 8 of the Accessories and Abettors Act 1861.) The secondary party need not have been present when the offence was committed.
Joint enterprise	A common law doctrine under which two or more defendants can be convicted of the same offence in relation to the same incident regardless of whether they had the similar or differing levels and types of involvement in the incident.
Judge's summing up	The judge's summary of a case for the jury, once all the evidence in a trial has been heard. The judge sets out the law in relation to the charges and summarises the evidence that has been presented. In complex cases the judge may provide written 'routes to verdict', detailing specific questions that the jury should address in order to reach their verdict on each charge.
Judge's sentencing remarks	The comments made by the judge when passing sentence, following the prosecution's account of the offence and the defence advocate's plea in mitigation. The judge sets out the sentence and explains why that sentence has been selected.
Life sentence	A sentence under which the offender serves a specified minimum term, following which s/he can apply for parole. If released, the offender must remain on licence for life. A life sentence is mandatory for all who have been convicted for murder.

<i>Mens rea</i>	The element of criminal responsibility which is concerned with the offender's state of mind when committing the offence. It is usually conceived in terms of the offender's intention and/or recklessness.
Manslaughter	The act of unlawfully killing someone with the intent for murder but where a partial defence applies, or through conduct that was grossly negligent, or through conduct involving danger of harm that resulted in death.
Murder	The act of unlawfully killing someone with the intent to kill or to cause grievous bodily harm.
Parasitic accessorial liability (PAL)	A form of joint enterprise liability whereby a secondary defendant is held liable for an offence committed by a principal defendant on the grounds that the offence had occurred in the course of an original criminal venture in which both were involved, and that the secondary party had, at a minimum, foreseen the possibility that the offence would be committed. This form of liability has effectively been abolished by the Supreme Court ruling in <i>Jogee and Ruddock</i> [2016] UKSC 8.
Principal offender	An offender who, with the necessary mental element, physically carried out the criminal offence.
Robbery	The offence of stealing from another with use of force or the threat to use force, contrary to section 8(1) of the Theft Act 1968.
Secondary offender	An offender who, with the necessary mental element, assisted or encouraged a principal to carry out the criminal offence.
Section 18 assault	The offence of wounding/causing grievous bodily harm with intent, contrary to section 18 Offences Against the Person Act 1861, committed when a person intentionally wounds or causes grievous bodily harm to another. The injury caused must break the continuity of the skin ('wounding') or entail very serious physical or psychiatric harm.

Appendix: Advisory group membership

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This report presents the findings of an exploratory study of joint enterprise, undertaken by the Institute for Criminal Policy Research, in partnership with the Prison Reform Trust, and within funding from the Nuffield Foundation. Joint enterprise is a doctrine of the criminal law which permits multiple defendants to be convicted of the same criminal offence even where they had different types or levels of involvement. It has been the source of great controversy in recent years.

The study looks at the application of the doctrine of joint enterprise in the prosecution of serious cases, and considers the implications of the recent Supreme Court ruling on joint enterprise, which determined that the law had taken 'a wrong turn' and required 'correction'.

The report argues that there is an urgent need for greater clarity and transparency in the way in which cases involving multiple defendants are prosecuted and sentenced in the future.



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